115-487

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 871.

J. W. MOFFITT AND T. W. FIELDS, PLAINTIFFS IN ERROR,

vs.

STEPHEN KURTZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JULY 2, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Petition for Writ.*

In the Superior Court in and for the City and County of San Francisco, State of California.

KURTZ *v.* MOFFITT & *al.*

In the Matter of the Application of STEPHEN KURTZ for a Writ of *Habeas Corpus.*

Petition for Writ of Habeas Corpus.

To the Hon. T. K. Wilson, judge of the superior court in and for the city and county of San Francisco, State of California:

The petition of Stephen Kurtz, a citizen of Pennsylvania, respectfully shows:

That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by J. Moffit & T. W. Fields, citizens of California, at the old city hall in the city and county of San Francisco, in the State of California.

2 That the said imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to wit: That he has been arrested by said persons as a deserter from the U. S. Army, and said persons had no warrant or other authority to make such arrest, and said persons are not officers of the United States.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said J. Moffitt & T. W. Fields, commanding them to have the body of petitioner before your honor, at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of his detention, and said writ, and that he may be restored to his liberty.

STEPHEN KURTZ.

Dated April 8th, 1885.

3 *Petition, &c. Affidavit.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Stephen Kurtz, being duly sworn, says: That he is the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

STEPHEN KURTZ.

Subscribed and sworn to before me this 8th day of April, 1885.

A. C. BERTHIER,
Dept. Co. Clerk.

4 *Writ of Habeas Corpus.*

In the Superior Court of the City and County of San Francisco, State of California.

The people of the State of California to J. Moffit and T. W. Fields, Greeting:

We command you that you have the body of Stephen Kurtz, by you imprisoned and detained, as it is said, together with the time and you cause of such imprisonment and detention, by whatsoever name said Stephen Kurtz shall be called or charged, before me, T. H. Wilson, judge of the superior court in and for the city and county of San Francisco, State of California, at the court-room of said court and in the city and county of San Francisco, on the 11th day of April, 1885, at 10 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the
5 said Stephen Kurtz; and have you then and there this writ.

Witness Hon. T. H. Wilson, judge of the said superior court, at the court-room thereof, in the city & county of San Francisco, this 8th day of April, 1885.

Attest my hand the day and year last above written.

T. H. WILSON,
Judge of the Superior Court.

Service of the within writ is hereby acknowledged, this 8th day of April, 1885.

J. MOFFIT.
T. W. FIELDS.

6 *Appearance of Defendants, by Alfred Clarke, Esq., Attorney.*

In the Superior Court of the City and County of San Francisco, State of California.

STEPHEN KURTZ, Plaintiff,
v.
J. MOFFIT and T. W. FIELDS, Defendant-.

Now come the said defendants, J. Moffit and T. W. Fields, and, by their attorney, Alfred Clarke, enter their appearance in said action, and herewith also file their petition for the removal of said cause into the circuit court of the United States in and for the ninth circuit, district of California.

ALFRED CLARKE,
Att'y for Defendants.

7 *Petition for Removal to U. S. Circuit Court.*

In the Superior Court of the City and County of San Francisco, State of California.

STEPHEN KURTZ, Plaintiff,
v.
J. MOFFITT and T, W. FIELDS, Defendant-.

Your petitioners, J. Moffitt and T. W. Fields, respectfully show

that they are the respondents in the above-entitled suit; that said suit was brought April 8th, 1885, in this court; that it appears from the complaint that the plaintiff at the time of commencing the said suit was and still is a citizen of the State of Pennsylvania, and respondents then were and still are citizens of the State of California. Your petitioners represent that the above-entitled suit was brought by said plaintiff to obtain his discharge from the custody of
8 your petitioners, and that it involves a question arising under the constitution and laws of the United States, to wit, the question whether a person who is not an officer of the United States has authority to arrest a deserter from the Army of the United States.

Your petitioners show that they have herewith filed their appearance in said action, and offer herewith their bond, executed by Wm. E. Hall and Thomas W. Bethel, as sureties in the penal sum of $250.00 conditional, as required by law for their entering in the circuit court of the United States on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto.

Your petitioners pray that said bond be accepted as good and sufficient according to said statute; and that the said suit may
9 be removed into the next circuit court of the United States, in and for the said district of California, pursuant to said statute in such cases made and provided, and that no further proceedings be had therein in this court.

And your petitioners will ever pray.

ALFRED CLARKE,
Att'y for Petitioners.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

J. Moffitt and T. W. Fields, being first duly sworn, says: That they are the petitioners above named; that they have read the foregoing petition and know the contents thereof, and that each and every of the matters and things therein stated are true.

T. W. FIELDS.
JOHN MOFFITT.

Subscribed and sworn to before me, this 9th day of April, A. D. 1885.

JAS. HIRSCH,
Dept. Co. Clerk.

10 *Bond on Removal.*

Know all men by these presents that J. Moffitt and Thos. W. Fields as principals, and Thomas W. Bethell and Wm. E. Hall, both of the city and county of San Francisco, as sureties, are held and firmly bound unto Stephen Kurtz in the penal sum of two hundred and fifty dollars, of the United States of America, to be paid to the said Stephen Kurtz, executors, administrators, or assigns; for which pay-

ment, well and truly to be made, we bind ourselves, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the ninth day of April, one thousand eight hundred and eighty-five.

The condition of the above obligation is such, that if said J. Moffitt and T. W. Fields shall enter and file, or cause to be entered and filed, in the circuit court of the United States in and for the
11 district of California, on the first day of its session next to be held, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the superior court of the county of San Francisco, State of California, in which Stephen Kurtz is plaintiff and J. Moffitt and T. W. Fields are defendants, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation shall be void; otherwise of force.

T. W. FIELDS. [SEAL.]
JOHN MOFFITT. [SEAL.]

Signed, sealed, and delivered in the presence of—
THOS. W. BETHELL.
WM. E. HALL.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

12 Thos. W. Bethell and Wm. E. Hall, being duly sworn, each for himself deposes and says: That he is a resident of the city and county of San Francisco, State of California, and a freeholder in said State of California, and that he is worth the sum of two hundred and fifty dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

WM. E. HALL.
THOS. W. BETHELL.

Subscribed and sworn to before me, this 9th day of April, 1885.

JAS. HIRSCH,
Dept. Clerk of the Superior Court of the City and County of San Francisco.

Endorsed: The within bond is hereby approved. Wilson, judge.

13 *Order Removing Cause.*

In the Superior Court of the City and County of San Francisco, State of California.

STEPHEN KURTZ, Plaintiff,
v.
J. MOFFITT and T. W. FIELDS, Defendant-.

Upon reading and filing the petition of J. Moffit and T. W. Fields, the defendants in the above-entitled action, and upon filing the bond, and good and sufficient sureties having been offered by the said de-

fendant- in the premises, and the same being by me, the judge of said superior court, duly accepted, it is hereby ordered that no further proceedings be had in this case, and the removal of the same to the circuit court of the United States for the district of California, to be held in and for the 9th district of California, be, and the same
14 is hereby, allowed and ordered in accordance with the aforesaid petition and the statute of the United States in such case made and provided.

WILSON, *Judge.*

15 *Clerk's Certificate.*

Office of the clerk of the superior court of the city and county of San Francisco, State of California.

I, Jas. J. Flynn, county clerk of the city and county of San Francisco, and *ex-officio* clerk of the superior court thereof, do hereby certify the foregoing to be a full, true, and correct copy of proceedings in the matter of the application of Stephen Kurtz for a writ of *habeas corpus*, on file in my office.

In witness whereof I have hereunto set my hand and the seal of said court, this 11th day of April, A. D. 1885.

JAS. J. FLYNN, *Clerk,*
By E. W. O'CONNOR, *Deputy Clerk.*

Endorsed: In U. S. circuit court, dist. of Cal. Transferred record. Filed April 20, 1885. L. S. B. Sawyer, clerk.

16 *Return to Writ.*

In the United States Circuit Court for the Ninth Circuit, District of California.

STEPHEN KURTZ, Plaintiff,
v.
J. MOFFITT & T. W. FIELDS, Defendants.

Now come the respondents and make this their return to the writ of *habeas corpus* herein, and shows that respondent, J. Moffitt, is a regular police officer of the city and county of San Francisco, and respondent, T. W. Fields, is a special police officer of said city and county; and being such officers, as aforesaid, they arrested the petitioner, Stephen Kurtz, in the city and county of San Francisco, by the authority of the United States in this, to wit: That said Stephen Kurtz, under the name of Stephen Noll, on the 29th day of May, 1876, at Cleveland,
17 in the State of Ohio, enlisted in the army of the United States for the term of five years, and on the 17th day of March, 1879, he being a soldier attached to Co. D of the 21st Regiment of Infantry of the Army of the United States, stationed at Vancouver Barracks in the Territory of Washington, deserted from the Army of the United States; and your respondents hold said petitioner for the purpose of delivering him to the military authorities of the United States to be tried according to the laws of the United States.

Respectfully submitted.

JOHN MOFFITT.
T. W. FIELDS.

Subscribed and sworn to before me, this 20th day of April, A. D. 1885.

E. BURKE,
Justice of the Peace.

Endorsed: Filed April 20, 1885. L. S. B. Sawyer, clerk.

18 At a stated term, to wit, the February term, A. D. 1885, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Tuesday, the 21st day of April, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Remanding Matter.

In the Matter of STEPHEN KURTZ on *Habeas Corpus.* No. 3678.

This matter, heretofore argued and submitted to the court for consideration and decision, upon the motion to remand same to the superior court in and for the city and county of San Francisco, State of California, having been considered, it is ordered that said
19 motion be, and the same hereby is, granted, and the above-entitled matter remanded to said superior court.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled matter.

Attest my hand and the seal of said circuit court, this 21st day of April, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON, *Deputy Clerk.*

Endorsed: Roll. Filed April 21, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

20 *Notice of Appeal.*

In the Circuit Court of the United States of America, Ninth Judicial Circuit, in and for the District of California.

STEPHEN KURTZ, Plaintiff,
v.
J. MOFFITT and T. W. FIELDS, Defendants.

You will please take notice that the defendants in the above-entitled action hereby appeal to the Supreme Court of the United States from the order remanding the above-entitled cause to the superior court of the city and county of San Francisco therein entered, in the said circuit court, on the 21st day of April, 1885, in favor of the plaintiffs in said action and against said defendants, and from the whole thereof.

Dated this 6th day of June, 1885.

Yours, &c. ALFRED CLARKE,
Attorney for Defendants.

21 To the clerk of said circuit court and R. M. Swaim, Esq'r, attorney for plaintiff.

Endorsed: Due service and receipt of a copy hereof admitted after filing, this 9th day of June, 1885. R. M. Swaim, attorney for plaintiff. Notice of appeal. Filed June 9, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

22 In the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of California.

In the Matter of STEPHEN KURTZ, on *Habeas Corpus*.

STEPHEN KURTZ *v.* J. MOFFITT and T. W. FIELDS.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing twenty-one written pages, numbered from 1 to 21, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above-entitled matter and cause, and that the same together constitute the return to the annexed writ of error.

23 Witness my hand and seal of said circuit court this 22d day of June, A. D. 1885.

[The Seal of the Circuit Court, District of Cal'a.]

L. S. B. SAWYER, *Clerk*.

24 *Assignment of Error and Prayer for Reversal.*

In the Supreme Court of the United States.

JOHN W. MOFFITT and T. W. FIELDS, Plaintiff- in Error,
v.
STEPHEN KURTZ, Defendant in Error.

Specification of Error.

The plaintiff in error specifies the error on which he will rely, as follows: That the court erred in remanding the case to the superior court.

Wherefore the plaintiff in error prays that the decision complained of be reversed, and that he have such relief as may be proper in the premises.

Respectfully submitted.

ALFRED CLARKE AND
A. C. SEARLE,
Counsel for Plaintiff in Error.

Address of counsel: Room 2, Old City Hall.

25 (Endorsed:) In the Supreme Court of the United States. No. —. Moffitt *et al. v.* Kurtz. Assignment of error and prayer for reversal. In clerk's office U. S. circuit court dist. of Cal. Filed June 17, 1885. L. S. B. Sawyer, clerk.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Stephen Kurtz, plaintiff and defendant in error, and J. W. Moffitt and T. W. Fields, defendants and plaintiffs in error, a manifest error hath happened, to the great damage of the said J. W. Moffitt and T. W. Fields, as by thier complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of June, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

[The Seal of the Circuit Court, District of Cal'a.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court, District of California,
By J. D. MONCTON,
Deputy Clerk.

The above writ of error is hereby allowed.
LORENZA SAWYER,
Circuit Judge.

27 *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within we are commanded.

[The Seal of the Circuit Court, District of Cal'a.]

By the court.

L. S. B. SAWYER, *Clerk.*

We accept service of the within writ, and wa-ve the issue of citation and bond for costs. We will file our appearance and file

the transcript in the Supreme Court of the United States without delay.

H. G. SIEBERST,
R. M. SWAIN,
Att'ys for Kurtz, the Defendant in Error.

Dated San Francisco, June 17th, 1885.

[Endorsed :] United States Supreme Court. Stephen Kurtz, pl'ff and def't in error, *vs.* J. W. Moffitt & T. W. Fields, def'ts and pl'ffs in error. Writ of error. Filed in clerk's office U. S. circuit court, district of California, June 17th, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

[Endorsed on cover:] California C. C. U. S. No. 871. J. W. Moffitt and T. W. Fields, plaintiffs in error, *vs.* Stephen Kurtz. Filed July 2, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ....

S. KURTZ, PLAINTIFF IN ERROR,

vs.

J. W. MOFFITT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

Brief for Plaintiff.

This is a writ of error to the Superior Court of San Francisco, which is the highest Court having jurisdiction to try the questions at issue,* which we specify as follows:

* NOTE.—In *habeas corpus* the Superior Court is the peer of the Supreme Court: Santa Cruz v. Santa Clara, 62 Cal., 40. Precedent: Barbier v. Connolly, 5 Sup. Ct. Rep., 357.

Assignment of Error and Prayer for Reversal.

To the Honorable the Supreme Court of the United States.

The plaintiff in error specifies the errors of which he complains.

1st. The Court erred in deciding that desertion is a crime.

2nd. The Court erred in deciding against plaintiff upon his plea of the Statute of Limitation.

3rd. The Court erred in deciding that defendants had any right, power or authority to arrest plaintiff.

4th. The Court erred in deciding that desertion was a continuous offense, and of the grade of infamous or felonious crime.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ....

S. KURTZ, PLAINTIFF IN ERROR,

vs.

J. W. MOFFITT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

Brief for Plaintiff.

This is a writ of error to the Superior Court of San Francisco, which is the highest Court having jurisdiction to try the questions at issue,* which we specify as follows:

* NOTE.—In *habeas corpus* the Superior Court is the peer of the Supreme Court: Santa Cruz v. Santa Clara, 62 Cal., 40. Precedent: Barbier v. Connolly, 5 Sup. Ct. Rep., 357.

Assignment of Error and Prayer for Reversal.

To the Honorable the Supreme Court of the United States.

The plaintiff in error specifies the errors of which he complains.

1st. The Court erred in deciding that desertion is a crime.

2nd. The Court erred in deciding against plaintiff upon his plea of the Statute of Limitation.

3rd. The Court erred in deciding that defendants had any right, power or authority to arrest plaintiff.

4th. The Court erred in deciding that desertion was a continuous offense, and of the grade of infamous or felonious crime.

5th. The Court erred in deciding that no special warrant was required to authorize the arrest of plaintiff by defendant.

Therefore, the judgment should have been for the discharge of the plaintiff in error.

Wherefore plaintiff prays that the decision complained of be reversed, and that he have such relief as may be proper in the premises.

H. G. SIEBERST,
R. M. SWAIN,
Attorneys for Plaintiff in error.

The defendant in error specifies the error of which he complains.

The Court erred in denying defendant's motion to dismiss the case. (See Bill of Exceptions, folio 19, of record.) Because the cause was properly removed to the Circuit Court, and improperly remanded by the Circuit Court to the Superior Court, and the Superior Court had no jurisdiction to proceed to hear the case on the merits. (16 Pet., 97.)

The Superior Court acquired no jurisdiction by the remand of the case.

Wherefore defendants pray that the Superior Court be directed to dismiss the case on the gronnd that it has no jurisdiction.

ALFRED CLARKE.
S. W. SANDERSON,
Attorneys for defendant in error.

Points and Authorities on behalf of Plaintiff.

I.

The petitioner was arrested in California as a deserter from the United States army, by the respondents, then and there Police Officers of the City and County of San Francisco, without a special warrant, and when no complaint had been filed.

II.

The power of respondents to make such an arrest is either given by the Laws and Articles of War of the United States, or by the Statutes of the State of California, or not given.

III.

The act of desertion from the United States Army is not an offense against the Laws and Statutes of the State of California.

IV.

If it was, it is barred by the Statutes of Limitations, it being more than three years since said alleged desertion.

See sec. 800, Penal Code, State of California.

V.

The question as to whether the act of desertion under the Laws and Statutes of the State of California, is an infamous act or crime, cannot arise under said Laws and Statutes.

VI.

It then follows that petitioner cannot legally, under the State Laws, be arrested for said crime, and his arrest is and was illegal.

VII.

There is no express and direct authority given by the laws of the United States to police officers, granting them the power or privilege to arrest deserters.

VIII.

General Orders, No. 92 of the War Department, confers the power of arresting deserters from the United States Army, to the United States Marshals, in their respective districts, the Mayor and Chief of Police of any Town or City, the Sheriffs of the respective counties in each State, and all Postmasters and Justices of the Peace.

See General Orders 92, dated, War Department, Washington City, July 31st, 1862, also,
Trask *v.* Payne, 43d Barbour, page 570.

IX.

The order of the War Department is very precise and specific in naming the persons authorized to make these arrests, and that power cannot be delegated.

Trask *v.* Payne, 43 Barbour, page 547.

X.

Desertion is not a felony at Common Law, and is not made so by any Statute.

Ib., 43d Barbour, page 575.

XI.

Sec. 1,049, United States Revised Statutes, creates a law especially for the District of Columbia, and for no other State or Territory.

XII.

In this case Judges Sawyer and Hoffman expressed their opinion that desertion (in time of peace) was not an infamous crime.

XIII.

Under the Revised Statutes of the United States, desertion in any case is not a felony until the sentence is passed and punishment inflicted by Court Martial.

XIV.

The plaintiff, even if he is a deserter from the army, has not forfeited his right of citizenship.

Secs. 1,996–97–98 Revised Statutes.

Wherefore plaintiff prays that the judgment of the Superior Court be reversed.

Respectfully submitted.

H. G. SIEBERST,
R. M. SWAIN,
Att'ys for Plaintiff.

Due service of the above brief is hereby admitted this day of June, 1885.

ALFRED CLARKE.
S. W. SANDERSON,
Att'ys for Defendant.

Stipulated: This case is submitted for decision on the briefs of plaintiff and defendant.

H. G. SIEBERST,
R. M. SWAIN,
Att'ys for Plaintiff.
ALFRED CLARKE
S. W. SANDERSON,
Att'ys for Defendant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

Nos 860, 841.

S. KURTZ, PLAINTIFF IN ERROR,

vs.

J. W. MOFFITT AND T. W. FIELDS,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

Brief for Defendants.

The defendants contend:

1st. That the Superior Court had no jurisdiction to proceed with the hearing of the case on the merits after the case was removed to the Circuit Court, and that defendant's motion to dismiss the case (vide Transcript, folio 19, for defendant's exception) should have been granted.

2nd. That the judgment remanding the prisoner is correct.

POINT FIRST.

"The defendant was entitled to a right under the law of the United States, and on the facts of the case the judge had no discretion to withhold that right. No objection can be made to the form of the application, nor to the facts on which it was founded.

This being clear in the language of the above act, it was the duty of the state court 'to proceed no further in the cause,' and every step subsequently taken in the exercise of a jurisdiction in the case, whether in the same court, or in the court of appeals was *coram non judice.* * * *It is impossible to conceive of a case in which the right of removal could be more unquestionable than in this case.*" (Gordon *v.* Longest, 16 Peters, 104, A. D. 1842.)

We suggest that under the constitution of the United States, "the judicial power of the United States, extends to all cases arising under this constitution, the laws of the United States," etc. (Art. 3, § 2) This power is lodged in one supreme court, and such other (federal) courts "as congress shall ordain and establish."

U. S. Const., Art. 3, § 1.

The judiciary act of September 24th, 1789 (1 U. S. Stat., 73), provided (§ 14) that the circuit and district courts should have power to issue the writ of habeas corpus, "provided that the writ of habeas corpus shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the United States, or are necessary to be brought into court to testify."

We pause here to ask what was the extent of the writ intended to be issued under § 14 of the judiciary act? We suggest that it was intended to reach every case of unlawful imprisonment under color of federal authority, and every case of imprisonment which should be in contempt of the national sovereignty. "*The prisoner is then within the dominion and exclusive jurisdiction of the United States.* * * *If wrongfully imprisoned, their judicial tribunals can release him and afford him redress.*" (Sturgis v. Crowningshield, 4 Wheat, 122; Houston v. Moore, 5 Wheat., 27; Prigg v. Com., 16 Peters, 614; Booth, 21 How., 523; Tarble, 13 Wall., 397 *et seq.*)

The state habeas corpus reached all other cases, and as the national writ reached all cases not reached by the state writ, and the state writ reached all cases not reached by the national writ, there was no hiatus or confusion because there was no cause for any. (92 U. S. R. 542—550.)

Why was the exception made in favor of state jails? We reply that congress knew that the jails were agencies of the states for the enforcement of the state laws, and that when the prisoner was in a state jail he was in the custody of the state, under color of its laws.

But as the state courts were more numerous than the federal courts, and strongly reflected the local political opinion which prevailed within their jurisdictions, a gradual encroachment on the sphere of federal jurisdiction may be traced, which finally culminated (Feb'y 3, 1855) in the supreme court of Wisconsin declaring an act of congress to be unconstitutional. (Ableman *v.* Booth, 21 How., 516.) This great decision which marked the limits of state and federal authority need not be quoted here, but we contend that under it we are entitled to claim, that in all matters of which the federal government has exclusive control, and this is such a case, the state shall abstain from interference as the federal government abstains from interference with the government of the states.

The conflict of jurisdiction which resulted from this encroachment may be traced through the leading cases, which rise like peaks of submarine mountains above the waves of time.

THE CASE OF STACY.—

In 1813 the judicial power of New York signified to Gen. Morgan Lewis, commanding United States troops, its readiness to arrest and imprison him if he did not produce in the state court Samuel Stacy whom he held in military custody. (Re Stacy, 9 Johns., 328.)

THE CASE OF BOOTH.—

On the 11th of March, 1854, at Milwaukee, Booth interfered with some persons who were executing the fugitive slave law of 1850. On the 3d of February, 1855, the supreme court of Wisconsin tore him from the custody of the federal judiciary and set him free. (See 21 Howard, 506 *et seq*)

THE CASE OF TARBLE—

Arose in Wisconsin, August 10th, 1869, from the issue of a writ by the state court, for Tarble, who was a soldier in the military service of the federal government. The state rescued the soldier from the military power of the nation, and set him free! In April, 1870, the supreme court of Wisconsin sustained the lower court in intruding its process into the domain of federal power. (See 13, Wall., 397, *et seq.*)

THE CASE OF CASEY—.

In January, 1871, the judiciary of New York imprisoned Gen. Neill, of the United States army, for not producing a deserter. (8 Blatch., 164.)

And many other instances might be cited if it were necessary to do so.

THE ANTITHESIS.

There are a line of decisions contrary to the above, which may be traced from 1807 to the present time, as follows:

A. D. 1807, State *v.* Plime, T. U. P. Chart (Ga.) 142.
" 1809, *Re* Roberts, 2 Hall's Law Jour. (Md.), 192.
" 1812, *Re* Ferguson, 2 Johns. (By Kent) 239.
" 1816, *Re* Rhodes, 12 Niles, W. Reg., 264.
2 Wheeler's Cr. Ca., 567.
" 1819, Wright *v.* Deacon, 5 Serg. & Rawle, 64.
" 1839, State *v.* McBride, Rice, 400.
" 1850, Norris *v.* Newton, 5 McLean, 93.
" 1851, Charge by Judge Nelson, 1 Blatch, 635.
" 1851, *Re* Sims, 7 Cush., 285.
" 1852, People *v.* Moore, 14 How., U. S., 13.
" 1853, *Re* Jenkins, 2 Wall., Jr., 529.
" 1856, *Re* Robinson, 1 Bond., 44.
" 1856, *Re* Sifford, 5 Am. Law Reg., 660.
" 1858, Booth's case, 21 How., 506.
" 1861, *Re* Kelly, 37 Ala., 476.
" 1861, *Re* McDonald, 9 Am. Law Reg., 664.
" 1862, State *v.* Zulich, 5 Dutch., 413.
" 1863, *Re* Spangler, 11 Mich., 305.
" 1863, *Re* Shirk, 3 Grant cases. 460.
" 1867, *Re* Farrand, 1 Abbott, U. S., 142.
" 1867, U. S. *v.* Jailor, 2 Abbott, U. S., 279.
" 1869, *Re* Hill, 5 Nevada, 159.
" 1871, *Re* Neill, 8 Blatch., 164.
" 1872, *Re* Tarble, 13 Wall., 397.

The latter line of decisions merge and drown the first line so completely that the first are only interesting as relics of the past. But the same causes which produced the first line of decisions (viz.: state pride and ignorance of the law) are still operative, and produce irritation and confusion, or we should not have had the caustic suggestion from the supreme court of the United States, in 1879. (100 U. S., 272.) "It is time these matters were understood."

Our adversary contends that a municipal policeman cannot exercise federal power, and that all that he does must necessarily be

done in his character as a state officer, and that his act takes its character, not from the law which authorizes it, but from the man (evanescent, perishable and transient though he be) through whom for the moment the law becomes operative.

We suggest that this proposition is not sustained by the decisions of this court, or by our daily observation, and that it is contrary to reason.

It was held in 1842 that the right to recapture fugitive slaves was derived exclusively from the federal constitution.

Slaves were frequently captured by persons who were neither United States' Marshals nor officers of the army, sometimes perhaps by their owners and occasionally by policemen. "For this purpose the owner was the *agent* of the law * * * to take the slave," etc. (Prigg *v.* Com., 16 Peters, 614, *et seq.*)

Here was federal power exercised by a person not an offi--- the federal government.

In 1842 it was held that the warrant for the arrest of Smit[illegible] issued under the federal law, because that was the authorit[illegible] der which the governor of the state acted, and the fact that he was governor did not make it otherwise. (In re Smith, 3rd McLean, 121).

In re Spangler (1863), it was held "*for the true character of the power we must look to its source and not to the channel through which it flows.*" (By MANNING, J., 11 Mich., 307.)

In re Vandervelpen, it was held that *state* and federal judges derived their power under § 5,270, R. S. U. S., "not from their official station, but from the delegation of power conferred by this act." (14 Blatch., 137, A. D. 1877.)

The federal government "can act only through its officers and *agents*, and they must act within the states." (Tenn v. Davis, 100 U. S. R., p. 263, A. D. 1879.)

"It was insisted that congress cannot punish a state judge for his official acts, and that judge Cole in selecting his jury was performing a judicial act." "This assumption cannot be admitted. *Whether the act done by him was judicial or not, is to be determined by its character, and not by the character of the agent.* Whether he was county judge or not, is of no importance The duty might have been committed to a private person." (Virginia, 100 U. S., 346, A. D. 1879.)

"But it is said the parties assaulted are not officers of the United States, and their protection by congress in exercising the right to

vote does not stand on the same footing as the protection of persons who are officers of the United States." "But the distinction is not well taken. The power in either case arises out of the circumstances that *the function in which the party is engaged, or the rights which he is about to exercise, is dependent on the laws of the United States.*" (Yarbrough, 110 U. S. R., 662, A. D. 1884.)

Under § 1,014 R. S. U. S., "Any *Magistrate of a State* may arrest, etc., any person for any crime against the United States," etc. (Robinson v. Satterlee, 3 Saw., 140; G. P. C. *v.* Cal. V. P. C., 6 Saw., 532; U. S. v. Shuman, 7 Saw., 440.)

§ 1,750, gives certain consular officers power to act as *notaries public.*

§ 1,758, empowers *local municipal officers* to administer oaths in certain cases.

§ 1,778, empowers *notaries public duly appointed in any State* to administer oaths in certain cases.

§ 2,181, empowers *State Judges of Courts of Record and Justices of the Peace* to administer oaths in certain cases.

§ 3,066 "authorizes *Justices of the Peace* to issue search warrants on complaint of United States revenue officers."

§ 3,833 "authorizes *Justices of the Peace* to enforce the postal laws."

§ 4,522 authorizes *Justices of the Peace* to enforce certain penalties.

§ 4,546 gives *Justices of the Peace* certain power over seaman's wages.

§ 4,556, authorizes the crew of a vessel to complain to a *Justice of the Peace* that the vessel is unseaworthy.

§ 4,559, authorizes the United States Consul in a foreign port under certain circumstances to appoint *two disinterested persons* to report what ought to be done to a vessel in order to continue the voyage.

§ 4,606 authorizes *the Captain of a vessel* to deliver an offender to a *Constable*," etc.

§ 5,270 confers power on *Superior Judges* of the states to act under the foreign extradition law; and

§ 5,280 confers power on *Justices of the Peace* to arrest foreign sailors deserting their ships in the United States.

The case of Cota, 110 U. S. R., 385, is instructive. He was arrested on an extradition warrant issued by the governor of California, under the treaty with Mexico.

Neither the constitution nor statutes of California gave the governor any power to issue such a warrant, and it was entirely unauthorized unless issued (as it was) under federal law.

We urge, that, in the many instances which we have cited, the act done or to be done by the state officer is an act of federal power because authorized by federal law, and that an act does not receive its character from the person who may perform it, but from the law which authorizes or commands it to be done.

For example: "Counterfeiting is a crime against the United States, because it discredits the coin, and a crime against the State because it is a fraud." [See the opinion of chief justice Waite, in United States *v.* Cruikshank, 92 U. S. R., 550.]

Take the case of two brothers who are engaged in counterfeiting. One is arrested and brought before the mayor of San Francisco. The mayor under the state laws does not hold a magistrate's court, but under § 1,014, R. S. U. S., he has express power to hold the offender for trial in the proper federal court. He does so hold him, and the prisoner is confined in the jail awaiting trial. The other brother is now arrested and brought before the police judge who elects to proceed under the state law and who holds the offender for trial in the state court. Both prosecutions proceed without obstruction, both result in conviction, in both cases the sentence is ten years in the penitentiary.

In this illustration there was a concurrent right to proceed against the offender, so that each sovereign should retain and punish its prisoner, as they did, and this right would not be diminished by the fact that the crime which laid the foundation of the proceedings was one and the same act in which both brothers participated. But the jurisdiction to try was not concurrent because the crime was not against one law common to both courts, but on the contrary each tribunal punished, the particular prisoner which it secured for a violation of the law of the sovereign, whose power created the court which tried and punished the offender. The federal court proceeded under § 5,457, R. S. U. S.; the state court proceeded under § 477, penal code of California. Neither court administered the law of the other, and each administered the power of a different sovereign.

During the prosecution and punishment, these two men were confined in the same jail and penitentiary, part of the time in the same cell. They were always in the custody of the same jailor. The turnkey with the same hand locked the one in the cell of federal custody and the other in the cell of the custody of the state.

And although each was in the same cell as the other, and both were in the same cell, they were each as completely in the power of the sovereign which each had offended as either could be if there was no other sovereign on the earth besides the one who held him prisoner. [See United States *v.* Barnhart, 6 Crim. Law Mag., 204, A. D. 1885.]

We claim that the judiciary act of September 24th, 1789, conferred no *habeas corpus* jurisdiction on the state courts.

The title of the act sustains this view. "An act to establish the judicial courts of the United States."

Congress was engaged in ordaining and establishing federal courts as required by Art. 3, § 1, of the constitution.

The federal constitution does not ordain or create the writ of *haheas corpus*, but it says the privilege of the writ shall not be denied, etc. (Art. 1, § 9, p. 2.)

The states retained all the *habeas corpus* jurisdiction which did not pass through the federal constitution to the national government.

The federal government still possesses all the jurisdiction which can be exercised by *habeas corpus* in any case arising under "this constitution, the laws of the United States, and the treaties made, or which shall be made under their authority." None of this power has been restored to the state judiciary by any act of congress, and if it had been it would still be federal power though exercised for the time being by a state officer.

We have shown that many state courts failed to regard the proper limitations of state and federal power in the use of the writ of *habeas corpus*, but we refer to the following leading cases to show that some of the state courts have been sound on this question:

1839, State *v.* McBride, 1 Rice, 400.
1852, *Re* Sims, 7 Cush., 285.
1863, *Re* Spangler, 11 Mich., 305–7.

We call particular attention to the deliverance of MANNING, J., in the latter case, which is as follows:

"The first question that meets us in this case is one of jurisdiction—a question, it must be admitted, of more than ordinary importance, as it involves a construction of the constitution of the United States as to the power of the federal and state courts, in the use of the writ of habeas corpus, to discharge from imprisonment persons illegally deprived of their liberty.

"We have two governments—a state government and federal government. Each of these governments is supreme within its appropriate sphere. The line that separates the powers of the two is not at all times easy to trace. Some parts of it are well defined, while other parts of it are more obscure and difficult to follow. This is owing, in part, at least, to the double relation we sustain as citizens of both governments, subject to the laws and regulations of both, and owing allegiance to both.

"According to the theory of our government, the sovereign power is in the people. And viewing that part of it delegated by them for governmental purposes as a whole, the two goverments together make that whole. In this sense neither is a whole in itself, any more than the legislative, executive or judicial part of the government is the whole government. Each of these departments is but a part of the government, acting independently of the others, and at the same time correlatively with them; and so closely are they bound together, as a whole, that it is not at all times an easy task to find where the independent action of one of them ceases and that of another begins. It is not, therefore, at all surprising that a like difficulty should sometimes be experienced in determining between the powers of the federal and state governments, as a whole—in fixing the precise point where the functions of one cease to act, and those of the other begin to act. The power to act in a given case we may know exists in one of the two, but in which, may not be so easy of solution; and yet it may be necessary to the harmonious action of the sovereign power delegated to them that it should be solved. For, without the independent, harmonious and correlative action of both, we can hardly expect to gather the golden fruit anticipated by our fathers in the formation of our somewhat complicated, and yet simple form of government.

"The two governments, in the sense already stated, are only one whole. Without either we should have but half a government; a fact too frequently overlooked, and we fear too little regarded by us, when we permit ourselves to become the partizans of either, in opposition to the other. We should think a man very unreasonable who should attempt to increase his powers of locomotion by strengthening one of his limbs at the expense of the other. This shows us the great care that should always be kept in view by each government, while determining its own powers, not to encroach on the powers of the other.

"Neither is supreme, in the sense that it has power to dictate to or control the other, when acting in its appropriate sphere. Each is supreme within its own sphere. Neither is supreme within the sphere of the other. A common constituency supports, upholds, and gives vitality to both. To the federal government belong all questions outside of the states that pertain to us as a nation, and such powers within the states as are given to it by the federal constitution, in express terms or by clear implication; while all local and municipal powers not ceded to the federal government, belong to the states. Each has its writ of habeas corpus. Each has power under its constitution to suspend the writ on the happening of a certain contingency. The object of the writ is the same in both governments, It is to release from imprisonment, within its judicial limits, persons entitled to its protection who are deprived of their liberty without warrant of law.

"The territory of a state is common to both governments. The territorial jurisdiction of both governments, therefore, so far as it respects the state, is the same. But is the judicial jurisdiction incident to the writ of habeas corpus the same? We think not. Otherwise, the powers of the federal and state courts, as it regards this writ ~~court~~, are identical; and if they have a common concurrent jurisdiction, the power given to either government by its constitution, to suspend the writ, for all practical purposes is a nullity, as neither can suspend the writ of the other, and as the only effect of a suspension by one, would be the same as that of abolishing the jurisdiction of one of two writs having a common concurrent jurisdiction, viz.: To drive the suitors of both courts into the one whose jurisdiction was left unimpaired. Besides, if both governments have a common jurisdiction in the use of this writ, we have two independent governments, neither responsible to the other, acting upon the same subject matter. One may imprison, the other may release from such imprisonment, for the former to renew the imprisonment, and the latter again set free, until the stronger overpowers the weaker.

"Any construction of the federal constitution that leads to such results, must necessarily be erroneous. We can not suppose the people, in adopting the federal constitution, intended to make such a distribution of the sovereign power delegated by them as to place one part of it in antagonism to another.

"There must, therefore, from the very nature of our institutions, be a line separating the powers of the two governments, on this, as well as on every other subject.

"The question then arises, where is that line, and what constitutes it? There can be but one. And that appears so clear to my mind (it may appear differently to others) that I almost wonder how any other should ever have been thought of. It is this: that the state courts have the right, and it is their duty, in all cases authorized by the laws of the state, to issue the writ of habeas corpus to inquire into the legality of the imprisonment of any person deprived of his liberty within the state, and to discharge him therefrom if wrongfully imprisoned, unless he is imprisoned or restrained of his liberty by the federal government.

"By this I mean, not by one acting in his own right, but by one acting for and in right of, and under authority from the federal government; or claiming in good faith and under color of such authority to be so acting. I use these last words for the reason that good faith and color of authority are necessary to prevent imposition, and to oust the state jurisdiction. These being judicially ascertained, the state court can go no further. It cannot inquire in the validity of the authority, or the legality of the detention under it; for this would be taking jurisdiction of the whole question.

"The state courts have a right to inquire whether the person imprisoned is within the state jurisdiction, which he must be if in the state, unless he is deprived of his liberty by authority of the federal government; in which case he is not, so far as it regards his imprisonment and the state writ of habeas corpus. In the language of chief justice Taney, in the cases of Ableman v. Booth, and the United States v. Booth, 21 How., 523, 'He is then within the dominion and

exclusive jurisdiction of the United States.' He is, as it regards the state habeas corpus, as completely beyond its reach for the purpose of releasing him, as he would be were he not within the state. Up to the point of imprisonment by the federal government the state habeas corpus has jurisdiction. It then ceases and the jurisdiction of the federal habeas corpus begins. In all cases of imprisonment, other than by the federal government, the state writ of habeas corpus has exclusive jurisdiction. In all cases of imprisonment by or under authority of the federal government, the federal writ of habeas corpus has exclusive jurisdiction.

"Instances have occurred in which the writ of each government has been sent across this line into the dominions of the other. Such irregularities are calculated to produce irritation, and bring on an unseemly conflict between the state and federal courts, and thereby disturb the harmonious action of the two governments. As we have already said, any construction of the federal constitution that leads to such results, must be untenable. * * *

"The fact that the governor, as appears by his proclamation, thought proper to act in ordering the draft (and we do not question his right) under the laws of congress and orders of the war department, instead of the laws of the state, does not change the power under which the draft was made, and Spangler is held by the draft commissioner. The state executive is the conduit through which power passes that holds the prisoner; and for the true character of that power we must look to its source, and not to the channel through which it flows. If one of our sheriffs should be deputed by the United States marshal to serve a writ from the federal court, this court would have no authority to entertain a motion to set aside the service, because it was made by the sheriff. And it would not alter the case if the state should be interested in the prosecution of the suit in which the service was made.

"The writ and all further proceeding under it, I think, should be dismissed for want of jurisdiction." (By Manning J., Re Spangler, 11 Mich., 307, A. D. 1863.)

We claim that the jurisdiction which the state has surrendered, and parted with, and transferred to the United States, and which congress has conferred on the circuit and district courts of the United States is not retained and cannot be exercised by the state courts.

"No court can exercise judicial power unless it is derived from some government or sovereignty." (Booth, 21 How., 523.) The superior court had no power or authority under the constitution and laws of California, to hear this case after the removal thereof to the circuit court. The federal laws gave the superior court no power to hear it after the removal. The case was one which belonged to the federal judiciary and which did not belong to the state judiciary and the superior court should have dismissed the case as moved by the defendants.

"The state could not exercise concurrent jurisdiction without coming into direct collision with the laws of congress."

"The jurisdiction was exclusively vested in the national courts * * and could not be exercised by the state courts."

Houston *v.* Moore, 5 Wheat., 27, A. D. 1820.

"Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as though they had been forbidden to act." (Prigg *v.* Com., 16 Peters, 614, A. D. 1842, citing Sturgis *v.* Crowningshield, 4 Wheat., 122 to 193.)

"As a matter of policy, I am opposed to this blending of jurisdictions. Whatever ingenious theories may be broached, in which the government of the United States is made a part of that of South Carolina, and the government of South Carolina is made part of that of the United States, to a plain understanding it would appear, that the departments of the two, and their various functions, are entirely separate and distinct, having concern with, and relation to, each its particular and separate class of subjects, interests, and duties. I consider it a wise policy, to prevent conflict and preserve harmony, that each should be kept moving in its own orbit. * *

"The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. * * In remarking on this article formerly, I laid down the proposition, that the judicial power of a state, in its original constitution, is co-extensive with the legislative, and extends to all subjects of controversy which can arise under the laws. Without any specific enumeration, therefore, of the judicial power in the constitution, the courts of the United States, from the very nature of their office and duty, would have taken cognizance of all those cases which are embraced in the three first clauses; because they are arising, or which would arise, under the limited legislation of a government of limited powers. And of all those classes of cases, their jurisdiction is exclusive. * *

"The judicial power must be general or limited, according to the scope and objects of the government; in a word, it must be fully and exactly commensurate with that of the legislature. It cannot by any terms of language be made to extend beyond the legislative power, for such excess would be inconsistent with its nature. The clear, well defined separation between the legislative function of the general government and that of the states, at once presents the principle in strong relief. The classes of subjects to which the legislation of congress may extend, are enumerated in the constitution. The jurisdiction of the federal courts extends to all cases arising under laws passed there, and to some others expressly mentioned." * * (By Earle, J.; concurring, Johnson, Chancellor; Gantt, Richardson, Evans and Buttler, Justices. State v. McBride, Rice, 400, 412, May, A. D. 1839.)

"And the theory of the general government is, that these subjects, in their full extent and entire details, being placed under the jurisdiction of the general government, are necessarily withdrawn from the jurisdiction of the state, and the jurisdiction of the general government therefore becomes exclusive. And this is necessary to prevent constant collision and interference; and it is obvious that it must be so, because two distinct governments cannot exercise the same power, at the same time, on the same subject matter. This is not left to mere implication. It is expressly declared, in art. 1, § 8, ¶18, that congress shall have power to make all laws which shall be necessary and proper, for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof." * *

Re Sims, 7 Cush., 299, A. D. 1851.

In 1875 the supreme court of the United States (92 U. S., 550) speaking by its chief justice instructed us as follows: "The people of the United States, resident within any state, are subject to two governments—one state and the other national; but there need be no conflict between the two. *The power which the one possesses the other does not.* They are established for different purposes *and have separate jurisdictions.* Together they make one whole. * * This does not imply that the two governments possess powers in common."

"When the national government was formed, some of the attributes of state sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the states ceased to extend. Before the adoption of the constitution, each state had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the constitution was adopted, a portion of that judicial power became vested in the newly created government and *so far as thus vested, it was withdrawn from the sovereignty of the state.* Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and *to that extent the sovereignty of the state is restricted.*" (Tenn. v. Davis, 100 U. S., 267, A. D. 1879).

Therefore the superior court should have granted defendant's motion (folio 19 of transcript), and dismissed the case.

POINT SECOND.

The judgment remanding the prisoner is correct.

There are five errors assigned by plaintiff and we shall attempt to respond to each in the order in which plaintiff has stated them.

We take issue with the plaintiff and affirm that:

I.

Desertion is a crime against the United States.

See § 18 Act of March 16, 1802, 2. U. S. Stat., 136.

Art 20 of § 1 of Act of April 6, 1806, 2 U. S. Stat., 302.

Art 47 of § 1,342, R. S. U. S., 1878.

Desertion is punishable under the statute of the United States with imprisonment at hard labor, which may extend to life (and formerly, but not now, by flogging and branding). (Articles 47 and 51 of § 1,342; also, §§ 1,351, 1,353, 5,455 R. S. U. S.) Also, by forfeitures of bounty, pay, homesteads, deposits, artificial limbs, etc. (See §§ 709 to 714, Scott's Digest, A. D. 1872, and §§ 137 to 164, Drum on Desertion, 1882); and forfeiture of citizenship. (§§ 1,996–8, R. S.)

II.

The plea of the Statute of Limitation, under Article 103 of § 1,342, R. S. U. S., or § 800 of penal code, *cannot be received on habeas corpus*. (*Re* Arno White, 9 Saw, 49–52; *Re* Reed, 100 U. S., 13.)

III.

The defendants had a right to arrest plaintiff.

The defendants were citizens of the United States, and owed allegiance to the federal government. (Const. U. S., Art. 6, § 2.)

They were a part of the people and parties to the national constitution. (See preamble to the constitution and Desty's notes.) "Every citizen being a constituent member." (19 How., 404.) They were and are militia men of the United States. (§ 1,625 R. S., and Scott's Digest, § 780.) The president as commander in chief did (gen. order 325, A. D. 1863) "call on all good citizens to aid in restoring absent soldiers to their regiments." This order is still in force.

The laws of the state (§ 24 of consolidation act of April 19, 1856) required the defendants to be citizens of the United States, and to swear to support the constitution of the United States.

The new constitution of California (1879) required (Art. 20, § 3) the defendants to swear to support the federal constitution, and article 1, § 3, clinches the nail.

The federal government has supreme power over the army, under the right to raise and support armies, declare war, etc. "The power of the United States is absolute." (Tenn v. Davis,

100 U. S., 257). And "it can employ any means for the fulfillment of its duties." (12 Wall., 457.)

The government pays $2 for each recruit (§1,120, R. S.), and $30 to any civilian or soldier for the arrest of a deserter. (See § 214, page 28 of Army Regulations, A. D. 1881; Scott's Digest, § 714 and notes; Drum on Desertion, § 57-59; Desty's Federal Const. and notes to Art. 1, § 8, ¶ 18, page 106.)

The United States may execute its laws by force in any state (Siebold, 100 U. S. R., 395), and may select its officers and agents for this purpose. (12 Wallace, 457; 16 Peters, 614.) The offer of $30 for the arrest of the deserter is an agency of the national government for the execution of its power. The agent who accepts this employment has power to use force to execute "the supreme law of the land," and this execution is not a breach of the peace of any state. (Siebold, 100 U. S., 395; Yarbrough, 110 U. S., 662.)

IV.

Desertion is continuous, and is an infamous crime.

The obligation of the deserter to return to his duty is continuous (under his contract of enlistment and the law) until it is performed. If he returns to his duty, he ceases to be a deserter, although, unless saved by some act of pardon, he is subject to punishment for his past desertion. (Drum on Desertion, § 8 *et seq.*)

The constitution of the United States (fifth amendment) speaks of capital or otherwise infamous crimes. Congress has given its definition of this section in § 1,049, Rev. Stat., Dist. Columbia. This court has construed this language in *Re* Wilson, decided March 30, 1885. 5 Sup. Ct. Rep., 935. (See U. S. *v.* Brady, 3 Crim. Law Mag., 69-74.)

We have shown, p. 14, *ante*, the punishment for desertion. We remark that it is a crime of great enormity, judged by its injury to the public service. The offender has deprived himself of a trial by jury, and consigned himself to imprisonment for life, hard labor, confiscation of property, and infamy.

V.

No special warrant was requisite for the arrest of plaintiff.

A warrant in law exists when a statute authorizes the doing of an act.

A special warrant is a paper signed by a magistrate, or issued un-

der seal of a court, commanding an arrest, etc. (§§ 814, 1,427, penal code, Cal.)

Under § 1,014, R. S. U. S., for any crime against the United States, the offender may be arrested by any "magistrate according to the usual mode of process in such state," etc., and § 836, penal code of Cal., prescribes that, in case of felony, or when the offender is arrested in the act, a special warrant is unnecessary, the statute being the warrant.

We claim that crimes are infamous or not infamous (5th am'd constitution U. S.), or as designated in §§ 16-17, penal code, felonies and misdemeanors, and that desertion has none of the indicia of a misdemeanor, but has all the features of a felony, and that we are authorized to apply to it the felony procedure which justifies an arrest without a special warrant in cases where the statute is the warrant.

On this question, the state is not and cannot be neutral. The deserter is not a citizen, and the state can give him no asylum. The crime he has committed is not against a foreign government, but against a sovereignty whose dominion extends to every foot of territory which any state can claim. All state officers, under art. 6, § 1, p. 3, const. U. S., and art. 20, § 3, const. of Cal., are enlisted on the side of the federal government, and we claim that the defendants not only had the power, but that it was highly proper for them, to make this arrest. (*Re* Lafonte, 2 Rob., 498, La., 1842.)

The constitution of California (1879) recognizes the right of the defendants to "acquire property." (Art. 1, § 1.) The laws which we have cited (offering $30 for the arrest of deserters) were in force when this constitution was adopted, and we say that no power under the state of California can prevent the defendants from acquiring this money.

The plaintiff is not entitled to his discharge under any provision of federal or state law. His case is hopeless under the federal law. By joining the army he subjected himself to military law, and the jurisdiction of military courts. The state could not protect or shield him if she were so inclined. She has no city of refuge where he can be safe. Congress for the time being may respect state jails (§ 14 judiciary act, A. D. 1789, § 753 R. S. U. S.) but outside the jail there is not a wrinkle on the surface of the continent between the roaring Atlantic and the rippling Pacific, where the deserter can hide in safety from the power of the national government.

The constitution of California clearly negatives the claims of the plaintiff. It declares (art. 1, § 1) that "all men are by *nature* free, and have inalienable rights, etc., *inter alia*, acquiring and possessing property." etc.

If the plaintiff was free by *nature* under our constitution, he lost his freedom temporarily by his enlistment, and became subject to apprehension by any *agencies* which the national government should employ for that purpose. Congress has not exhausted the power of the nation. (16 Peters, 614–624.) If the present regulations should prove insufficient, further power may be exercised. Congress, as we have seen, has confided the execution of federal powers, in very many instances to persons holding offices under the states. The patriotism of the people has been fostered by this confidence, and the result has been satisfactory in the past. But we say that in every instance in which federal power is confided to any officer or *agent* of the United States, such officer or *agent* is as far above and beyond the power of the state (executive, legislative or judicial) as though he were beyond its territorial limits. The Prigg case (16 Peters, 614) is express to the point that the owner of the slave was the *agent* of the federal government. The Booth case expressly speaks of *agents* as distinguished from officers. Tenn. v. Davis (100 U. S. R., 263) speaks of officers and *agents* of the federal government. The Siebold case (100 U. S. R., 386), speaks of officers or *agents*, of the United States government, and the Tarble case (13 Wall., 397 *et seq.*,) defines the authority of the United States to be "*an authority, the validity of which is to be determined by the constitution and laws of the United States.*" And adds: "If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, *and those courts or officers alone*, to grant him release." Under the constitution of California the plaintiff and defendant do not stand on equal ground or come with equal claims. The plaintiff seeks to place the sovereignty of the state as a shield between him and the federal government. He is not permitted to use it in this manner. The defendants have not placed themselves in opposition to the law. The plaintiff has. Their rights are the *natural* right to liberty, and to acquire and possess property which they have not surrendered, and consequently the right to apprehend the plaintiff who is not entitled to his liberty, and they have the further right to acquire and possess the reasonable sum of $30 which the national government

has offered them for their services in this behalf. The plaintiff has surrendered his right to liberty by the commission of the crime of desertion against the sovereignty of the nation, and subjected himself to the power of the nation, exercised by the defendants at its instance and in its behalf, and whether the defendants be employed by the year or by the month, by the job or by piecework, is a matter which concerns not the plaintiff, and from which he can derive no advantage.

In arresting a deserter the power and authority of the state is not exercised. The state legislature could not prohibit or punish the arrest of a deserter from the United States army, because any such law would interfere with the powers of the national government.

The rule of the police department is of no more force than if it were an act of the legislature, and as an act of the legislature it would be unconstitutional, being contrary to the supreme law of the land. (Tape *v.* Hurley, 5 West Coast Reporter, 692.)

WE CONSIDER THE FOLLOWING EXTRACTS PERTINENT TO OUR CONTENTION:

"The state cannot deny to the general government the right to exercise all its granted powers though they may interfere with the full enjoyment of the rights she would have if those powers had not been thus granted."

"Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the state. It is carved out of them." Virginia, 100 U. S. R., 346. (See *re* Sims, 7 Cush., 285, A. D. 1851.)

"But where the subject matter is one of a national character or one that requires a uniform rule, it has been held that the power of congress is exclusive."

Siebold, 100 U. S. R., 385.

"If the power of congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and *agents* must have the requisite authority to act without obstruction or interference from the officers of the state."

Siebold, 100 U. S. R., 386.

"When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will

disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and state governments in a matter in which they have a mutual interest."

Siebold, 100 U. S. R., 387.

"As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the state will retain the power of enforcing such of its own regulations as are not superseded by those adopted by congress, it cannot be disputed that if congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties."

Siebold, 100 U. S. R., 387.

"The power of congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the state which are inconsistent therewith."

Siebold, 100 U. S. R., 392.

"The constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity."

Siebold, 100 U. S. R., 392.

"It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every american citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But, if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No

greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the state governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country, requires that both the national and state governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them, according to a fair and practical construction of the constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties, and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other."

Siebold, 100 U. S. R., 394.

"It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government.

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of american soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

Siebold, 100 U. S. R., 394–5.

"The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

Siebold, 100, U. S. R., 396.

"Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." (McCulloch *v.* Maryland, 4 Wheat., 423.)

Legal Tender Case, 110 U. S. R., 450.

"The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other" (citing Slaughter H. cases, 16 Wall., 74; U. S. v. Cruikshank, 92 U. S. R., 549; further about dual government, 6 Crim. Law Mag., 204, A. D. 1885).

DECISIONS OF STATE COURTS..

Desiring to present all that may aid the court in the solution of the question, we refer to the following state decisions.

A. D. 1852. Hutchings *v.* Van Boklen, 34 Me., 126. The action was replevin for the person. The deserter was remanded and it was held that no special warrant was required for the arrest of a deserter.

A. D. 1863. Trask *v.* Payne, 43 Barb., 569. The action was for damages which were given against a deputy sheriff. This case is cited by plaintiff. We remark that the order of July 31, 1862, cited in that case, has been superseded by the act of congress of March 3, 1863, § 7 of which made it "the duty of the provost marshals to arrest all deserters and send them to the nearest military post." The same act (§ 26) authorized the president to issue a proclamation in regard to deserters. The president accordingly did "*call on all good citizens to aid in restoring absent soldiers to their regiments.*" (See gen. order 325, 1863, Army Reg. 1863, § 156-7; Army Reg. 1881, page 28, § 214.

A. D. 1866. Huber *v.* Riley, 53 Penn., 119. The action was for damages for not allowing plaintiff to vote. Defense that he was a deserter. Damages given in the sum of one dollar.

A. D. 1869. Hickey *v.* Huse, 56 Me., 497. The action was for damages for arresting the plaintiff as a deserter. No damages given.

A. D. 1869. State *v.* Symonds, 57 Me., 150. Defendant was indicted for illegal voting. The state claimed that he was a deserter. Judgment reversed.

These decisions were all rendered before the great decision in the Tarble case.

EXTRACTS FROM THE TARBLE DECISION.

"There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments." * *

"In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

"Now, among the powers assigned to the national government, is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several states there are one or more officers authorized by law to issue writs of *habeas corpus* on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the national troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every state large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of *habeas corpus* for the discharge of soldiers

in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the national government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on *habeas corpus* are summary, and the delay incident to bringing the decision of a state officer, through the highest tribunal of the state, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the national government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty." * * *

"The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of *habeas corpus* issued by him could pass over the line which divided the two sovereignties." (*Re* Tarble, 13 Wall., 406-412, A. D. 1872.)

CASE OF THE FIRST MICHIGAN CAVALRY.

"Certain veterans of the First Michigan Cavalry and recruits whose term of service (three years) would not expire previous to February 1, 1866, were consolidated into a regiment, designated as the First Veteran Cavalry. An Indian outbreak having occurred in New Mexico, which endangered life and property, and which was undoubtedly the outgrowth of the war of the rebellion, and the troops of the Regular Army being employed in important positions from which they could not be removed, this regiment was, in June, 1865, ordered against these Indians. Some 200 of the men deserted at Fort Leavenworth, and did not return. These are the men who claim that the war was over, and that they had a right to go home because they could not legally be sent against hostile Indians."

"DEPARTMENT OF JUSTICE,
"*Washington, May* 6, 1880.

"SIR: Yours of the 22d ultimo, addressed to the Attorney-General, states a case 'concerning certain men of the First Michigan Cavalry, who re-enlisted as veteran volunteers in December, 1863, 'for three years or during the war.' In June, 1865, the regiment was ordered to New Mexico to quell an Indian outbreak, and while *en route* some two hundred of the men deserted at Fort Leavenworth, Kas., in June and July, 1865, and did not return.'

"Then, after presenting extracts from opinions upon the case by the judge-advocate-general and the adjutant-general, you proceed as follows:

"'Inviting your attention to the opinions of the judge-advocate-general and adjutant-general, I have the honor to request your opinion upon the questions at issue, viz:

"'1st. Whether the retention of this regiment in service until March, 1866, was legal.

"'2d. Whether or not, under the terms of their enlistment contract, they could be ordered to New Mexico to quell an Indian outbreak in June, 1865.

"'3d. Whether or not the offense committed by these men was in fact desertion.'

"The time at which the objects of any war have been so attained and secured as to justify its being ended, is a question for the political department of the government exclusively. No other department, and, *a fortiori*, no citizen or soldier, or number of such, has any faculty for deciding that question for the public or for themselves. The case of The Protector (12 Wall., 700) recognizes this principle, and, referring to the proclamation of the president to that effect, ascertains that the late war closed on the 20th of August, 1866. There can be no doubt, therefore, that in point of law the term of the service of the First Michigan Cavalry covered the months of June and July, 1865, as completely as it did the corresponding months of the year before. It is equally certain that the point at which—and the military force against which—it might be called upon to serve during the war were matters exclusively for the political and military authorities of the country to pass upon. So long as in the judgment of the political department the objects of the war had not been attained and secured, the army was to remain upon the alert to resist any violence, direct or collateral, principal or incidental, that might arise to jeopardize success. In such a condition of things it seems impossible to allow soldiers to draw distinctions involving the degree or direction of the professional service which they are to render.

"I therefore answer the questions above stated, respectively, as follows:

"1st. The specified retention of the regiment until March, 1866, was legal.

"2d. The order sending the regiment to quell an Indian outbreak in New Mexico, in June, 1865, was valid.

"3d. The offense committed by the men at Fort Leavenworth, taken in connection with the animus by which it was inspired, was in point of law *desertion*.

"Very respectfully, your obedient servant,

"S. F. PHILLIPS,
Solicitor-General.

"THE SECRETARY OF WAR.

"Approved.

"CHAS. DEVENS,
Attorney-General.

[First Indorsement.]

"The Secretary of War concurs in this opinion.

"By order of the Secretary of War:

"H. T. CROSBY,
"*Chief Clerk.*

"WAR DEPARTMENT, *May* 11, 1880."

Argument.

The plaintiff seeks to reverse the judgment of the superior court.

The defendants urge that the conclusion reached by the superior court is correct, but that the court had no jurisdiction to hear the case on the merits, because it appeared from the "application for the writ that the prisoner was within the dominion and jurisdiction of another government" (13 Wall , 412), and the defendants, as shown by their exception (folio 19 of record), moved to dismiss the case, which motion should have been granted. The error which has been committed to the prejudice of the defendants in this case, is of a magnitude far exceeding any interest which the plaintiff has, or can have, in this case. The interest of the plaintiff in this case goes no further than the personal liberty of one man. The question raised by the defendants affects the right of one grand and thirty-eight smaller sovereignties to exercise judicial power. The defendants should have been the appellants, but, as the judgment was given in their favor, they were not in a position to appeal. The record, however, brings up our bill of exception, and we are confident that this court will consider the point which we present. The accident that the court below decided in our favor does not preclude us from being heard here. It was our good fortune to pass through the ordeal without loosing our prisoner, but we protest against being exposed to such jeopardy again.

The plaintiff attempts to send the case back to the superior court to be retried. We say the superior court has no jurisdiction to try the case at all. "A case arises under the laws of the United States, where * * * an officer is ordered to arrest an individual. * * * All who are employed are protected, * * * yet this protection is secured * * * *by the judicial power alone.*" (Tenn. *v.* Davis, 100 U. S. R., 264-5.) Should we not be heard here on the matter of jurisdiction before we are sent back? Will this court sanction the superior court in assuming a jurisdiction which belongs to the federal judiciary?

As we understand the law the decision of all judicial questions must be lodged in the courts of the sovereign whose power is in motion. Courts may sometimes administer foreign laws, but they do not assume plenary jurisdiction in such cases. They apply the foreign law, but they would not assume the power to decide on the constitutionality of the law of a foreign state.

Under our form of government a certain quantity of power has

passed from the states to the nation. The states retain all the power which they did not transfer to the nation, and the nation has all the power which passed by the federal constitution. The matter of raising and supporting armies has been confided to congress, and we urge that the questions of law involved in this case springing from the exercise of this power belong to the federal judiciary. The judicial power is the counterpart of the legislative power and must be co-extensive with it. The judicial power of the United States extends to all subjects within the legislative power of congress, and as the power of congress to raise and support armies is exclusive, so the judicial power to decide on how those armies shall be raised or supported must necessarily be exclusive.

We are willing to meet our adversary on the merits of this question in any federal court, but we are unwilling to submit our rights under the laws of the United States to the state judiciary. Ought we to be compelled to do so against our will and without our consent?

The policy of the state may be opposed to the policy of the general government on this subject, and "the legislation of the state may be unfriendly." (100 U. S. R., 262-6.) The state may encourage desertion from the army so as to increase her population. She may prefer a white citizen of Pennsylvania, although a deserter, to a foreign coolie. She wants labor to work her mines and cultivate her farms. It is cheaper to encourage desertion from the army than to organize and manage immigration aid societies. The national government may be so rich as not to feel the loss, and so strong as not to feel the drain upon its strength. Suppose the result of these desertions should be the weakening of the force which should control the savage Indians, and, in consequence, the Indians should slaughter some settlers in Arizona or New Mexico, still, if California gains largely in population by the accession of deserters from the army, is not the gain upon her side? There are plenty of young men in the great cities of the east to furnish more recruits for the army. Let the government enlist more men and take care of the Indians.

Are these remarks pertinent to our subject? Why require a special warrant for the arrest of a deserter? The special warrant is difficult to procure. The local magistrate may be hard to convince; he may support the policy of the state, and will the deserter, after he is discovered, remain waiting to be arrested while some one is trying to procure a special warrant?

We claim that under the federal constitution we have a right to be heard in a federal court on a question which arises under the judicial power of the United States. We are entitled to be heard in a court which "congress has ordained and established." (Const. U. S., Art. 3, § 1.) Congress never ordained or established the superior court of San Francisco. Congress never gave any *habeas corpus* jurisdiction to the superior court of San Francisco.

The jurisdiction which § 11 of the judiciary act of September 24, 1789, gives to the circuit court of the United States, concurrent with the courts of the several states, in civil actions, is subject to the right conferred on the defendant by § 12 of said act to remove the suit into the federal court. But as the same act (§ 14) gives the federal courts jurisdiction which is not concurrent with the courts of the several states to issue the writ of *habeas corpus*, it cannot be affirmed that § 11 and § 14 relate to the same subject.

§ 14 of the judiciary act is carried into the revised statutes as § 752, and we find that § 1 of the act of March 3, 1875, "to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts and for other purposes," gives to the circuit court original cognizance concurrent with the courts of the several states of certain suits of a civil nature, but the right of the defendant to remove the suit into the federal court is given by § 2 of the same act, and § 3 provides that in such case the state court "shall proceed no further therein."

We are brought by these provisions to the conclusion that if the writ of *habeas corpus* referred to in art. 1, § 9, ¶ 2 of the constitution of the United States, § 14 of the judiciary act of 1789, and § 752 R. S. U. S., is not a civil action within the meaning of §§ 11 and 12 of the judiciary act, and §§ 1, 2 and 3 of the act of March 3, 1875, then the jurisdiction of the circuit court of the United States in *habeas corpus* is not concurrent with the courts of the several states, but is exclusive of said state courts, and if it is a civil action within the true intent and meaning of said §§ then the right of removal is indisputable, and undeniable, and when the defendant takes the steps prescribed by law to remove the case, the jurisdiction of the state court is excluded, and it shall proceed no farther in the premises." (16 Peters, 104, page 2, *ante.*)

Both lines of reasoning lead to the same result, viz.: That if the jurisdiction is not concurrent it is vested exclusively in the federal courts, and if it is concurrent the superior court could "proceed no further" after the removal.

The *habeas corpus* jurisdiction of the superior court, under the constitution of the state, is unimpaired by any act of congress, and it is beyond the reach of congressional legislation. The federal writ of *habeas corpus* is equally beyond the reach of the state constitution or legislative power. The federal and state courts have no concurrent jurisdiction in *habeas corpus* proceedings, because no such jurisdiction has ever been *given by congress*. Under the federal constitution, the jurisdiction of each is exclusive, because "*the power which the one possesses the other does not.*" (92 U. S. R., 550.) "*When the constitution* (of the United States) *was adopted, a portion of that judicial power became vested in the newly created government, and, so far as thus vested, it was withdrawn from the sovereignty of the state.*" (100 U. S. R., 267.) See the line of authorities cited on page 4, *ante*.

No court has any jurisdiction except such as is derived from some government or sovereignty. As to all matters not within the purview of federal power the state court has jurisdiction because it has never been parted with or surrendered. But as to all matters pertaining to the federal government, the federal courts have the jurisdiction which the states have contributed to the federal government. It is true that under § 1,014, R. S. U. S., the state magistracy as well as the federal judiciary may arrest offenders against the laws of the United States, and under § 2,165, R. S. U. S., the state courts as well as the federal courts may naturalize foreigners. Under § 5,270 the judges of courts of record of the state as well as the federal judiciary can arrest foreign fugitives from justice. In these cases and some others the jurisdiction is concurrent because derived from the *same sovereignty*. But such is not the case in regard to the writ of *habeas corpus*, because (1) in the nature of the proceeding it must be otherwise, and, (2) congress never gave concurrent jurisdiction to the state courts in *habeas corpus* proceedings. As remarked by chief justice Waite, (92 U. S. R., 542), "the power which the one possesses the other does not, they are established for different purposes and have separate jurisdictions." (92 U. S. R., 542, 265.)

In this case we justify our act under the constitution and laws of the United States. That plea raises an issue of federal law. The plaintiff denies the justification and pleads a law or rule of the state or local authority. We deny the validity of the rule. All the issues must be determined under the federal laws, and we insist on *our right* under the constitution to be heard on these questions in a a court which "congress has ordained and established."

"A case consists of the right of one party as well as the other, and may arise whenever its correct decision depends on the construction of the constitution or law of the United States." (100 U. S. R., 264.)

We urge that independent of any question of police power, and above and beyond and superior to any power and authority in the state we had *a right* under the federal laws to arrest the plaintiff.

We say that when plaintiff enlisted in the army he placed himself "within the dominion and exclusive jurisdiction of the United States," (21 How., 506) and became subject to the military laws of the United States, and when he deserted he subjected himself to any agencies which the government might employ for his arrest. Such agents we were, and when we undertook to capture and restore him to the army, we were lawfully executing within the territory of the United States the laws of the United States, and no state authority had any power to impede or delay the execution of the national law. (People v. Moore, 14 How., U. S. R., 13; Siebold, 100 U. S. R., 395.)

We claim that the jurisdiction of the federal courts extends to the questions at issue in this case, and that said jurisdiction is exclusive, and that the state court has no jurisdiction to decide these questions.

We suggest that our rights are the rights of the United States to enforce her own laws, and that if we are justified by these laws in arresting the plaintiff, then the plaintiff is clearly within the domain of federal power and as clearly outside the jurisdiction of the state, and that the question whether we are or are not justified by the federal laws in arresting the plaintiff, is a question to be decided under the federal laws, and therefore a question within the exclusive jurisdiction of the federal judiciary. And if the federal courts have jurisdiction to try this question (as cannot well be doubted), then, in the words of chief justice Waite, "the power which the one possesses the other does not;" and the state court had no jurisdiction to hear our case on the merits, as it did after our objection and exception. We have seen that in §§ 1,014, 2,165, 5,270, R. S. U. S., (and other instances referred to on page 6, *ante*), congress has conferred federal power on state officers. Congress could have done otherwise and created multitudes of federal officers to enforce the federal laws. Whether congress, in selecting such means, was wise or unwise concerns not this case (although the state courts have sometimes thought proper to advise congress and criticise its acts.

Example: Manchester, 5 Cal., 237); but if congress has power to confer federal power on persons not officers of the United States, it is certain that it has done so.

This court has expressly recognized the authority of persons not officers, but simply *agents*, of the federal government to exercise federal power. In the Prigg case (16 Peters, 614) the slave owner was held to be the "*agent* of the federal government" to enforce the fugitive slave law. In the Booth case (21 How., 506) the power of the "officer or *agent*" of the federal government is asserted in the plainest language.

In Tenn. v. Davis (100 U. S. R., 263) we read that the United States government can act within the states, "by its officers and *agents;*" and in *Re* Siebold (100 U. S. R., 386), "that such officers and *agents* must have the requisite authority to act without obstruction or interference from the officers of the state." Other decisions might be cited in support of the power of the United States to employ *agents*, and of the power of the *agents* so employed to act. But we claim the point is established, and that we may look to the law of agency for further instruction.

The agent (we claim) represents his principal, and acts by his power and authority. If the United States government had to build a steamer, whenever it became necessary for a federal officer to cross a river, if a federal court had to be created and a United States marshal appointed in every remote settlement in order to prevent the United States laws from being entirely disregarded, the government of the United States would be very expensive.

Congress has placed some reliance in the patriotism of the people, which is so happily described by *this court* in 100 U. S. R., at pages 287 to 295, and the experience of one hundred years has justified the plan adopted by congress.

We find ourselves *agents*—simply agents, and not officers of the United States. But we are in the United States enforcing the laws of the United States within the scope of our authority and during our employment, and we are told by plaintiff in the year 1885, *in the superior court of San Francisco*, the tribunal of a sovereign foreign to the sovereignty whose power we are executing (and to which we belong by superior ties, attachments and obligations), that we had no power or authority to arrest plaintiff (see 3d error assigned by plaintiff) and said foreign tribunal against our remonstrance and protest solemnly recorded in the court (folio 19, transcript) proceeds to hear the case upon its merits, thereby assuming an au-

thority which was vested in the federal courts, and in them only.

We have not betrayed our principal, slept on our rights or been guilty of laches. We pointed to the constitution and laws of the United States for our justification and defense. We demanded that the procedure should be such as they prescribed. We recorded our protest at every opportunity. The transcript shows (folio 9) our prompt appearance in the state court, our petition for the removal of the cause to the federal court upon our verified allegation that federal questions were involved in the case (folio 11), and when the cause was remanded to the state court we asked for its dismissal on the ground that the state court had no jurisdiction to proceed, and our motion was denied, to which ruling we excepted (folio 19).

We have shown (page 6, *ante*), that congress has authorized *agents* in some cases to execute federal laws, that *this court* in four cases has recognized the authority of such *agents* to act, that in the matter under consideration we were acting as such *agents*, and although *this court* has said (A. D. 1879) "no person or power in this land has the right to resist *or question* the authority of the United States so long as it keeps within the bounds of its jurisdiction." Yet we were detained in the court of a foreign sovereign from April 8th to May 8th, and during all these thirty days "the operation of the general government 'in restoring this absent soldier to his regiment' (general order 325 of commander-in-chief of the army, A. D. 1863, page 21, *ante*), was arrested at the will of one of its members." And yet it was said in Tenn. *v.* Davis, 100 U. S. R., 263, that such a thing could not be done.

The record shows that the superior court was not unwilling to respect the supremacy of federal law (the order of removal (folio 18 of transcript) and the opinion of the court show that). The constitution of California is mandatory (art. 1, § 22), and under art. 5, § 1, and art. 6, § 5, and § 1476 of the penal code it was mandatory on the court to issue and hear the writ *if the court had jurisdiction.*

THAT IS THE QUESTION HERE.

There are sleeping in the cemeteries near San Francisco several men who made a mistake in regard to the right to arrest deserters and who paid the forfeit with their lives. A question so important should not remain doubtful. It ought to be decided by the highest authority.

"A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its

own existence. As was said in Martin v. Hunter, 1 Wheat., 363, "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the state court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of the state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested."

"We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." * * * *

"The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to a uniform and consistent administration of national law. It is required for the preservation of that supremacy which the constitution gives to the general government by declaring that the constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the supreme laws of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. The founders of the constitution could never have intended to leave to the possibly varying decisions of the state courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the constitution? If, whenever and wherever a case arises under the constitution and laws and treaties of the United States, the national govern-

ment cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme. In criminal as well as in civil proceedings in state courts, cases under the constitution and laws of the United States might have been expected to arise, as, in fact, they do. Indeed, the powers of the general government and the lawfulness of authority exercised or claimed under it, are quite as frequently in question in criminal cases in state courts as they are in civil cases, in proportion to their number."

Tenn. v. Davis, 100 U. S. R., 262-266, A. D. 1879.

The reasoning of the above quotation is as applicable to a *habeas corpus* as to any other judicial proceeding.

In this very case our adversary pleaded the California penal code (§ 800) as a defense to his desertion, and the state court entertained the plea and passed judgment on it. (See page 3 of plaintiff's brief.)

If the judicial power of the state extends to this subject, the legislative power must extend to it also, and it would be in the power of the state to pass a law prescribing a very short period as a limitation on the power of the government to arrest or punish a deserter, as was said by this court in the case of Prigg, 16 Peters, 614.

"The nature of the provision and the objects to be attained by it require that it should be controlled by one and the same will and act uniformly by the same system of regulations throughout the Union. If the states have a right to act upon the subject, each state is at liberty to prescribe just such regulations as suit its own policy, local convenience, and local feelings. The time, mode, limitation, proofs and other incidents applicable thereto may be prescribed in one state which are rejected or disclaimed in another. One state may make a statute of limitations as to the remedy in its own tribunals short and summary; another may prolong the period and yet restrict the proofs."

We have seen that where the subject is a national one or requires a uniform rule, the power of congress is exclusive. (§ 100 U. S. R., 385, p. 18, *ante*.) We suggest that the natural and necessary corrollary is that the judicial power of the government is the co-efficient of the legislative power, and is also exclusive in the absence of any legislation by congress conferring this judicial power on the courts of the states.

It may be said by our adversary that "if defendants were officers of the army, they would, under the Tarble decision, be exempt from the jurisdiction of the state courts, but the defendants are not officers of the army, nor do they hold any office under the United States. They are distinctly state officers and as such amenable to the jurisdiction of the state courts and while, if the agency was exclusively federal, the jurisdiction would be exclusively federal, yet

congress having adopted the agency of state officers, the jurisdiction of the state courts does attach to the proceeding."

We will examine this position, because, if it is correct, our point that the state court had no jurisdiction, must be untenable.

We have shown, page 6, *ante*, that in many instances, congress has devolved federal power on state officers, plain citizens and even foreigners.

When the crew of a vessel complain to *a justice of the peace* that the vessel is unseaworthy and the justice proceeds under § 4,556, R. S. U. S., is the justice exercising federal or state power? Would an appeal from his action lie to the superior judiciary of the state?

When a consul of the United States, in a foreign port appoints, under § 4,559, R. S. U. S., two disinterested persons to report on the condition of, and repairs required for, an American vessel in order that she may proceed on her voyage, what power do such persons exercise? These persons may be citizens and subjects of the foreign country where they live; but if they consent to act and do act, we think they are executing the laws of the United States, because these laws are the only laws which authorized them to act and the only authority they have to act at all.

When the captain of a British or other foreign vessel arrests, under § 4,606, R. S. U. S., an intruder who unlawfully boards his vessel in some port of the United States, and the captain takes the prisoner on shore to deliver him to a constable, what kind of power does that foreign captain exercise on the soil of the United States?

Certainly it is not the power of the state, for the state never gave him any such power.

Certainly it is not the power of the foreign nation to which the captain belongs. That power cannot be exercised in restraint of liberty on the soil of the United States without permission of our government. We say the power is federal power because derived from federal law, and that the character of the power is not determined by the character of the agent, but that it is determined by the source of his authority.

Some wealthy families baptize their children with water from the Jordan. Entering the mansion or the church, different vessels containing water may be seen. There may be water from the Mississippi and water from the Jordan. The quality of the water would not be determined by the shape or size of the vessel which contained it, but by the source from which it came. If, by accident, the water from the Jordan was placed in the domestic drinking fountain and the

Mississippi water in the baptismal font, even that change would not effect a change in the quality of the water, but each fluid would retain its own character unaffected by the character of the vessel in which for the moment it was contained.

And so we reason that federal power may be exercised by state officers, and truly was exercised by us, and the fact that we were state officers does not derogate from the federal power, or alter its quality, or bring our acts within the jurisdiction of the state judiciary.

"For the character of the power we must *look to its source* and not to the channel through which it flows." "*The act is to be determined by its character and not by the character of the agent.*" (100 U. S. R., 346, and other authorities cited on p. 5 and 6, *ante.*)

At the present time the extradition of Maxwell from Australia for the murder of Preller in St. Louis, is progressing, and James Tracy has been commissioned by the president of the United States and by the governor of Missouri to bring the prisoner from Australia to St. Louis. He is understood to be a police officer of St. Louis. Should the extradition of Maxwell be accomplished, would the state courts of California, Nevada and other states through which he may convey his prisoner, have jurisdiction on *habeas corpus* to examine the authority of Tracy to hold Maxwell? Is Tracy an officer (*or agent*) of the United States within the meaning of the Booth and Tarble decisions? He is not appointed by the consent of congress. Is his appointment constitutional? (See 29 Albany Law Journal, page 207.) He owes no duty to the national government, for a violation of which he may be punished by its tribunals or removed from office. His authority, in the first instance, comes from the state in which the fugitive stands charged with crime. He is in every substantial sense, her agent, as well in receiving custody of the fugitive, as in transporting him to the state under whose commission he is acting. What he does, in execution of that authority, is to the end that the violation of the laws of his state may be punished. The fugitive is arrested and transported for an offense against her laws, not for an offense against the United States. The essential difference, therefore, between the cases heretofore determined and the one suggested is that, in the former, the judicial authorities of the state claimed and exercised the right, upon *habeas corpus*, to release persons held in custody in pursuance of the judgment of a court of the United States, or by order of a circuit court commissioner, or by officers of the United States in

execution of their laws; while in the suggested case, the person who might apply for the writ would be in custody of an agent of another state, charged with an offense against her laws.

In the illustration which we suggest, it could not be claimed that Maxwell was in the custody of the courts of the United States, nor would it be true that his custodian was an officer of the United States, in the narrow sense which is suggested in 29 Alb. Law Jour., 207, but the only authority which Tracy would have to hold Maxwell in California or Nevada, or any state, other than Missouri, would be the authority derived from the laws of the United States. We claim that any one so held is within the dominion of the United States, and whether he is rightfully or wrongfully held is a question to be decided by the federal judiciary alone.

The murder of lord Cavendish and secretary Burke in Phœnix park, Dublin, and the great dynamite explosion in the parliament house in London, which resulted in the conviction of Cunningham and Burton, affords us an illustration to present the suggestion that if one of the Phœnix park murderers was arrested in San Francisco for extradition under the treaty of August 9th, 1842, and delivered over to the British officer under § 5,272 of R. S. U. S., which is as follows:

Section 5,272. "It shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name, and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any such custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall escape, may be retaken on an escape."

Could the state court of Nevada or any other state through which the foreign officer should pass, issue and hear a *habeas corpus* on petition of the prisoner? The prisoner might have been held for extradition in San Francisco by a superior judge of the state, and the case might never have been in a federal court. The prisoner in such case would not be held while in transit, by authority of the courts of the United States, or by a commissioner of such court, or by an officer of the general government acting under its laws, but if the state court should be strongly in sympathy with the discon-

tented people who encourage and sympathize with the Phœnix park assassins and dynamiters, would not the execution of the legislative acts of congress and the executive acts of the government of the United States be jeopardised by such a situation?

Would the state judiciary have the right in such a case to inquire into the grounds on which this Phœnix park assassin was restrained of his liberty within the limits of the respective states, and to discharge him therefrom if it be ascertained (by the state court) that such restraint was illegal under the constitution and laws of the United States.

Suppose the prisoner proved, to the satisfaction of the state judge, that he was not the person demanded under the treaty, or that the crime was a political offense and an act of war and not murder?

We claim that in such a case the *habeas corpus* jurisdiction is exclusively vested in the federal judiciary.

On May 9, 1884, A. W. Linderman and John Ahrens deserted from the Hawaiian bark Kalé, in San Francisco. Mr. H. W. Severance, the consul for the Hawaiian government, made his requisition under the treaty and § 5,280 R. S. U. S., on J. C. Pennie, a justice of the peace, for the recovery of these deserters. Judge Pennie being absent, the requisition was presented to H. W. Webb, police judge, who issued his warrant, and thereafter committed the deserters to the custody of the chief of police till the bark should be ready for sea, and then to deliver them on board. A writ was issued from the superior court of the state and the case heard on the merits, the contention of the prisoners being that judge Webb could not act on the requisition addressed to judge Pennie.

The prisoners being remanded, another writ was issued from the supreme court, returnable before judges Crane, Hamilton and Green, of the superior court of Oakland. They heard the case May 30, 1884, on the merits, and remanded the prisoners. We suggest, that as the prisoners were held under federal law, by the police judge the *habeas corpus* jurisdiction was exclusively in the federal courts. As the prisoners were remanded, no mischief was done except what results from the bad example of a court of justice assuming a jurisdiction which does not pertain to it and which does belong to courts of another sovereignty. But if the state courts can interfere in such cases, they can nullify the laws of congress, as was done in the Booth case on the third of February, 1855.

S. W. Green was arrested at Wilmington, Cal., on June 5, 1885, on a warrant issued by judge Toohy, of the superior court of San

Francisco, under § 5,270, R. S. U. S. He was brought on this warrant by a municipal policeman a distance of nearly five hundred miles to be examined under the treaty with Great Britain for extradition. He was not in the custody of a federal circuit court, nor a court commissioner, nor any officer of the United States. He was and is in custody of state officers, who are acting under the laws of congress. If the circumstance, that because state officers are sufficiently loyal to the national government to act under and enforce the laws of congress gives the state judiciary jurisdiction, it would be an inversion of the rule which this court has recognized in 100 U. S. R., 346, that "the act is to be determined by its character, and not by the character of the agent." (See authorities cited on pp. 5 and 6, *ante.*)

We submit that this case is an illustration of the operation of federal power, and that no writ of *habeas corpus* from a judicial tribunal of the state could release Green from the custody of judge Toohy's warrant. (Booth, 21 How., 506; Tarble, 13 Wall., 397.)

The "exclusion law" of May 6th, 1882, prohibits the landing of Chinese laborers. These persons have applied, in large numbers, to the federal courts for *habeas corpus*. Thousands of these persons have been landed in San Francisco from British vessels, commanded by British captains. The captain of the ship which carries these coolies to our shores is not an officer of the United States, and if that circumstance can oust the exclusive jurisdiction of the federal courts, then any state judge, who can issue a *habeas corpus*, can make the exclusion act as rigid or elastic as his own views on the subject of Chinese immigration.

Cheong Ah Moy was remanded by the circuit court of the United States, September 29, 1884 (4 West Coast Rep., 73) to the custody of "J. Maurey, master of the steamship Tokio, * * * or to the agent of the P. M. S. S. Co., * * * to deport her to China."

Being thus in custody, she was placed in the county jail for safe-keeping. On October 1, 1884, a verified petition was presented to the Hon. D. J. Toohy, judge of the superior court, showing "that Cheong Ah Moy was unlawfully imprisoned by P. Connolly, sheriff of San Francisco, in the county jail, and is not held by said sheriff under any warrant or commitment, or any other process, of this court, or any other court; nor is she confined or detained on any criminal charge whatsoever, nor as a witness."

The petition bears the signature of one of the counsel who appeared in the circuit court on the hearing which had resulted in the remand

to which we have above referred. This attempt to bring the question before the state court, after the matter had been fully heard in the circuit court of the United States, and decided by a full court, in which one of the justices of this court participated, shows that the laws of the United States may be nullified if the state courts can reverse or revise the decisions of the federal judiciary.

The custody of this Chinese woman under the decree of the circuit court, was not in an officer of the general government. It was expressly given to a captain of a steamer, or the agent of a foreign corporation. The fact that on the third of October the state court dismissed the case, is foreign to this argument. The exercise of the power of the circuit court was arrested by the state court for two days, although it was said, in the Tarble and Siebold cases, that such a thing could not be done. See authorities cited on pages 20–23, *ante*. We are discussing the right or power of the state court to issue or hear a writ of *habeas corpus* when the prisoner is in federal custody. We claim that the custody of captain Maurey was federal custody, because derived from federal law, and that no jurisdiction is acquired by the state court from the circumstance that the person who for the moment executes the federal law, is a private person, a state officer or a foreigner. Suppose that captain Maurey had taken this woman on the Tokio, and that, through stress of weather, or for purposes of commerce, the steamer entered another harbor in our state, could not the superior court of such county send its writ of *habeas corpus* to captain Maurey, and, if it be true that because the woman was not in the custody of an officer of the general government the state court could exercise jurisdiction, it would follow that the policy of the nation as expressed by the legislation of congress, and interpreted by its own judiciary, could be defeated by the action of a state judge whose views of national policy were adverse to the policy of congress. Some states favor compulsory labor, and others pursue a different policy, but, if the judges of the state courts can deal with such cases, then the exclusion law of the national government could be practically repealed by the action of the judiciary of a single state.

Congress has been liberal in the matter of investing the state courts with judicial power. Let us examine what congress has done. The examination of criminals is freely conferred by § 1,014, R. S. U. S., on state as well as federal magistrates. There the jurisdiction is concurrent because derived from the same source. The trial of grave crimes is vested exclusively by § 711, R. S. U. S., in

the federal courts. The jurisdiction of civil actions is vested by §§ 11 and 12 of the judiciary act and §§ 1 and 2 of the act of March 3d, 1875, in the circuit courts concurrent with the courts of the several states, *but subject to the right of the defendant* to remove the action into the federal court. The *habeas corpus* jurisdiction under § 14 of the judiciary act, and § 752–3, of R. S. U. S., is vested in the federal courts, and no concurrent jurisdiction has been granted by congress to the state courts.

This is suggestive. Under these provisions seven supreme judges, sixty-eight superior judges, five hundred justices of the peace and several dozen mayors and police judges in California can enforce the federal laws by holding criminals for trial in the federal courts, but they have no jurisdiction in grave cases to try. They cannot acquit a single criminal, nor have they any jurisdiction to discharge from custody. The trial power is vested exclusively in the federal courts and we say the *habeas corpus* power is also exclusive, and for the same reason, namely, that the safety of the national government requires that it should be vested in the national courts.

(Booth, 21 How., 506; Tarble, 13 Wall., 397.)

The justices of the peace constitute the inferior judiciary of the state, but they have no power to acquit in grave cases and (so far as we know) no *habeas corpus* power.

The magistracy of the state, superior and inferior, are authorized by federal law to hold and commit for trial under the laws of the United States, and thus, with the commissioners of the United States courts, they constitute the inferior judiciary of the nation, but the plenary power to hear and determine and the *habeas corpus* power is lodged in the superior courts of the state in the state sphere, and in the federal courts in the national sphere.

If the United States should, by treaty, confer on England or France, or any other foreign power, the right to convey prisoners across this continent, would the state courts have a right on *habeas corpus* to discharge such prisoners? The custodian would not be an officer of the United States within the tests suggested by 29 Alb. Law Jour., 207; but we claim that as federal power is the source of the authority the prisoner would be held under federal authority, and no state court could interfere by *habeas corpus* to discharge the prisoner. When the government of the United States treats with any foreign government, she must be able by her own courts to enforce the contract which she makes, and if the state courts can

deal with the question without restraint or correction by the federal courts (except by appeal) then the national government is powerless to enforce her own contract, and forfeits her right to be respected among civilized nations.

Searching as we are, for the very truth to guide us, we suggest that the sovereignty of the nation resides in the people, but the powers and attributes of sovereignty, are by no means extinguished or diminished. The people choose the congress, and the congress "has provided rules for the government and regulation of the (military) forces after they are raised." *No interference with the execution of this power can be permitted.*" (See extract from the great Tarble case, p. 21 and 22, *ante.*)

We were not acting in our own right as a parent controls his infant child, but "we were acting for, and in the right of, and under authority from the federal government in making this arrest." (11 Mich., 307, see page 10, *ante.*) "The captain detains the Chinese laborer in his character as *master* controling the ship and not in his individual personal character." (4 West Coast Reporter, 24 A. D. 1884.) The great powers of the sovereignty of the nation are distributed to different branches and arms of the public service and the sovereignty acts on "persons, territory and things" by its officers and *agents* (page 20, *ante*). It is a maxim of the law that "the incident follows the principal and not the principal the incident." (§ 3,540 civil code, Cal.) The chest in which the title deeds of real property were kept, received the superior savor of the deeds and lost its inferior quality of personal property and became real property. We suggest, that acting as we were in the execution of the powers of the sovereignty of the nation, we were the incident and the authority which we were executing, was the principal matter.

In arresting the plaintiff we lost our individuality and our official character as officers of the municipality of San Francisco, and became elevated by the superior authority of the majestic sovereignty whose power we were executing. The result of this situation is not the degradation of the federal power so as to make it subordinate to the control of the state judiciary, but it results that we are elevated by the superior authority which we were executing, and we follow our authority up into the federal courts above the sphere of state jurisdiction.

"The powers of the national government cannot be interfered with or controlled *for any period* by the tribunals of another sovereignty." (13 Wall., 406–412, pages 22–23, *ante.*)

The subject is not permitted to question the sovereign. He cannot bring suit against the sovereign in the sovereign's own court without leave from the sovereign, much less can he sue his sovereign in the court of a foreign sovereignty.

Why should the state courts be allowed to question the authority of the United States as has been done in this case?

It was said by this court in 1879 "no person or power has a right *to question* its authority." (100 U. S. R., 396, page 20 *ante.*)

Such intrusions create irritation and bring the administration of the law into contempt with the people.

That great confusion of decision has existed on this subject is a matter of history, and we know of no greater service that any one can render to our country than to aid in the solution of this important question. The great decisions in the Booth, Tarble, Cruickshank, Tennessee, Virginia, Siebold and Yarbrough cases will stand upon the sure foundation of unalterable truth, and future ages will look to them as land marks of the law till they shall be as hoary as the pyramids and longer, and the names of the great jurists who have been connected with those cases shall be immortal as long as republics shall exist upon our globe. The case which we present affords an opportunity for a grand exposition of the law and the zeal which animates us must be our excuse for the length of our argument.

A prominent legal writer quoting from a letter from sir Thomas Henry says: "The trial took place in 1854, and at a period when the law of extradition was very little known, either in England or the United States." (Spear on extradition, 2d ed., 189.) "There are many questions lying along the border line between federal and state authority which still remain to be discussed and settled." (T. M. Cooley, 1 Blackstone com., 13.)

If such is the condition of the law, we should not be surprised to find that our prominent legal writer found himself in a position which called for correction of a mistake into which he had fallen. In the first edition of his work, published in 1879, we find, pages 329 to 340, a discussion of the Kimpton case. He says, on page 338, "The principle upon which governor Rice placed his declinature, is not only sustained by the law of Massachusetts, but is fully in harmony with the purpose of the extradition provision of the constitution." In the second edition, published in 1884, the writer corrects himself, saying (page 434) "Was governor Rice justified in assuming this fraudulent intention, and then, on this basis, refusing to comply

with the law of congress? The proper answer to this question is in the negative. It is due to candor to say that a different opinion in regard to Kimpton was expressed in the first edition of this work. The author, however, having carefully examined that opinion, has seen what he deems a good reason for changing it."

Mr. Spear's work will not be less valuable because he is willing to correct his errors, but this instance teaches us to accept, with caution, his conclusions.

As applicable to the issue in this case, we find, on page 517, "state courts have assumed and exercised this jurisdiction for some reason, and there is no legal basis for it, except the fact that the restraint of liberty is by state agency acting within the limits of the state." We submit that this proposition does not show that the state courts have jurisdiction in the case we are considering. "The same person may be, at the same time, a citizen of the United States, and a citizen of the state, but his rights of citizenship, under one of these governments, will be different from those he has under the other." (By chief justice Waite, 92 U. S. R., 549.) If a person has *rights* under these two governments, then a state officer has rights under the federal government, unless the officer is not a person. These rights will be different. They are not inconsistent. The rights of citizenship, under the federal government, are superior and paramount; the rights of the states are subject and subordinate to the rights enjoyed under the supreme government. The defendants derive their power, "not from their official station, but from the delegation of power conferred by this act." (14 Blatch., 173, page 5 *ante*.) The rights of defendants to arrest plaintiff, are rights springing directly from the general government, and "the state cannot deny to the general government the right to exercise all its granted powers though they may interfere with the full enjoyment of the rights she would have if those powers had not been granted." (100 U. S. R., 346, page 18 *ante*.) Among these powers is the power to select its agencies, and it may select state officers as agents to execute its powers, and although they cannot be compelled to act, yet when they do act they exercise federal power. (Kentucky *v.* Dennison, 24 How., 104; *Re* Smith, 3d McLean, 121.) These authorities lead to the conclusion that the right of the state to call her own officers to account for executing the federal laws, is one of the rights which she surrendered, and which is vested in the federal government, and not retained by the state. This result is reasonable, and we might well say to the state judge, "Why dost

thou judge another man's servant? To his own master he shall stand or fall." We think our view "renders unto Cæsar the things which are Cæsar's," and that "when the rightful authority of the general government is once conceded and acquiesced in, the difficulties will disappear." (100 U. S. R., 387, page 18 *ante.*)

It is true, that for certain purposes, the state officer is the servant of the state and responsible to it within its sphere of jurisdiction, but this sphere does not trespass on the sphere of the federal power. The duties which we owe to each government are different, and there can be no confusion when they are correctly understood.

Jurisdiction is not obtained by bald and naked usurpation. We agree with our friend that "state courts have assumed and exercised this jurisdiction," or we could not have had the Stacy, Booth, Tarble and Casey cases (which we have cited on page 3, *ante*) to point to.

We agree with our friend that there ought to be a "reason" for the exercise of this jurisdiction by the state courts, but we think this court has very clearly taught us in the Booth and Tarble cases, that there is no reason for the state courts to do so, and that there are very strong reasons why they should not. We agree with our friend that "there is no legal basis for it, except the fact that the restraint of liberty is by state agency, acting within the limits of the state." But we submit that this reason is not sufficient to justify the exercise of state jurisdiction in a cause which belongs to the sphere of federal sovereignty.

If this reason exists, a state through which a foreign or interstate fugitive from justice is being conveyed, can, by its judicial power, discharge the prisoner and violate the treaty in the one case and the national constitution in the other. And this has been attempted.

In 1884, the govenor of Tennessee demanded from the governor of Nebraska, two fugitives from justice. They were surrendered, and while travelling through Iowa, they were *habeas corpused* by the state courts, as is shown by the following note from the governor's secretary.

STATE OF IOWA,
Executive Department.

DES MOINES, March 28, 1884.

ALFRED CLARKE, ESQ., San Francisco, Cal.

DEAR SIR:—In the Reeves and Turner case, in this state, the fugitives were surrendered by the governor of Nebraska on requisition of the governor of Tennessee, and *habeas corpus* proceedings were begun in Iowa while prisoners were in transitu through this state. Arguments were

made extending through several days, but the prisoners finally agreed to go with the agent, and no decision was made.

The case, however, makes a good illustration of your claim, that the authority is federal. The prisoners could not be surrendered by the governor of Iowa, because they had been brought here forcibly and were not in the state as fugitives from justice. Nor were they held as such in accordance with the Iowa statutes, since a particular affidavit required in this state was lacking. The claim made by the agent was, that he held the prisoners by authority of the United States for the purpose of taking them to Tennessee, and that no Iowa court could interfere with him. But no decision was reached, because the prisoners voluntarily gave up their case and went with the agent before the judge announced his opinion.

Very truly yours,

WELKER GIVEN.

Private secretary of the governor of Iowa.

Why should the state courts of Iowa interfere between Tennessee and Nebraska in the execution of the guarantees of art. 4, sec. 2 of the national constitution? That they can do so is clear if a "restraint by state agency within the limits of the state" gives jurisdiction to the state courts. We think it equally clear that this interference is an attack on the execution of an obligation to which all the people of all the states are parties, viz.: "that fugitives from justice shall be delivered up."

Suppose the restraint of liberty within the state is not by state agency, but by a foreigner who executes a law of congress (example, § 4,606, R. S. U. S., page 34, *ante*), does the jurisdiction follow the nationality of the agent into the court of a foreign sovereignty, or can the state court exert jurisdiction when one of the conditions (*i. e.*, state agency) of the rule invented by our friend is absent? If congress has power to enact § 4,606, the question of jurisdiction does not depend on the distance which the foreign captain may conduct his prisoner after landing and before delivery to a constable. It may be ten yards or it may ten miles, according to circumstances. But suppose a disorderly crowd obstruct, oppose and threaten the foreign captain and attempt to rescue the prisoner and the captain kills one of his assailants, would the killing be a breach of the peace of the state, even if necessary for the enforcement of federal law? Would the captain be subject to the *habeas corpus* power of the state judiciary? Would the constable after delivery of the prisoner to him be subject to the state writ of *habeas corpus?* Could the state courts hang the captain for enforcing the laws of the United States? Could the state courts on *habeas corpus* decide the act of congress

unconstitutional and discharge the prisoner, as was done in the Booth case?

They can do all these things if they have jurisdiction. They have done such things, as we have shown in our line of authorities on pages 3 and 4, *ante*. In this example we have a fair test of the excuse for the exercise of state jurisdiction which has been invented by our friend. The prisoner is delivered by the captain to a constable. The constable is a state officer. "The imprisonment is by a state agent within the limits of the state." The state court issues its *habeas corpus*, decides the act of congress unconstitutional and discharges the prisoner. Is not this the Booth case over again?

If the law was unconstitutional in the opinion of the state judiciary, the captain might be said by the state court to have had no authority to enforce it, and the state might hang the captain, although his act was clearly authorized by the supreme law of the land as construed by the federal courts which congress had "ordained and established."

Suppose the captain delivers the prisoner to a constable and the *justice of the peace* fines the prisoner $200 and imprisons him for six months, is the prisoner in custody of the state or of the United States? Can the state courts on *habeas corpus* review the proceedings of the justice? Is the prisoner within the sphere of federal or state sovereignty? The agency is not exclusively federal. "The agency is of the state and the imprisonment within the state."

We say that the jurisdiction is exclusively federal, and that no state writ of *habeas corpus* can relieve the prisoner.

The atmosphere of the state may be filled with hostility to the national government. (1815, 1833, 1861.) So far as the mischief of the decision is concerned, what difference does it make in the general result whether the court decides an act of congress unconstitutional over the shoulders of one man or another, a lieutenant in the army or a city policeman?

It is unreasonable to say that Tarble could not be heard in the state court because he was in the custody of an officer of the army acting under the laws of the United States, and that Kurtz can be heard because his captor is a city policeman acting under the same law which held Tarble in custody. In both cases the source of the authority is the same. The sovereignty is the same, and the jurisdiction, procedure and result must be the same.

The case of the Michican cavalry, cited on pages 23 and 24, *ante*, shows how the national strength may be weakened at a time when a

powerful blow should be struck. The commanding officer may be getting ready for the march. Canby and Custer had much to do besides hunting deserters. But if the contention of our adversary be correct, these heroic generals died in vain, because the national government has no power to prevent wholesale desertions from the army, and the best regiments in the face of danger may melt like snow in summer, and the slaughter of the officers close the campaign.

The savage and cruel mutilation of the bodies of the slain is a strong argument against the adoption of a rule which tends directly to produce such cruel and disastrous results.

Suppose the general of the army stops at a hotel and recognizes in the waiter who brings his dinner one of these deserters who decided for himself that the war was over. The general arrests the deserter and sends for a policeman to take the prisoner to the nearest military post while the general proceeds with his dinner.

Under the Tarble decision the state court could not send its writ of *habeas corpus* to the general. But the general employs "state agency, and the imprisonment is within the state." The state writ is issued for the prisoner to the policeman, and the state court holds that the prisoner is not a deserter, because the government had no right to send him against the Indians (page 23, *ante*), and discharges the prisoner.

The policeman is sued in the state court for damages, and judgment goes against him. (Trask *v.* Payne, p. 21, *ante*.) A man who helped the policeman is sued in the state court for damages. The defendant removes the action into the federal court. The federal court decides that the plaintiff was a deserter, and that defendant was justified in assisting to arrest him, and judgment goes against the deserter for costs. Here we have two conflicting judgments. If one is right the other is wrong.

The state is now called on to extend its protection to its citizen and to enforce the decree of its judiciary. The state legislature passes a law prohibiting any person from arresting or assisting to arrest a deserter without a special warrant (which cannot be procured without great difficulty).

The secretary of war, as we have seen, (page 24, *ante*), decides these men are deserters, and an officer of the army again attempts to arrest one; the result is a riot, because the mob support the state court. (Rosetta case.) The governor calls out the militia to enforce the state law, and the president sends the army to enforce the decis-

ion of the secretary of war, and we are back to the lesson which was forced upon us in 1861.

These cavalrymen decided not to go against the Indians in 1865, but the question whether they had or had not a right to absent themselves from the army was not finally decided until 1880. They acted in good faith and went to congress for relief. If the case had been taken into the state court it would surely have been decided against the government and in favor of the deserters. We think this illustration shows that there cannot be two sovereign wills acting on the same subject at the same time and in the same place. It is impossible and absurd. *It is war and not peace.*

Perhaps it may be said that the employment of the policeman by the general to convey the deserter is a mere matter of convenience, and that the policeman did not act in his own right but in the right of the general, and that as the general had the right to effect the arrest, he had the right to employ or accept assistance, and as "all who are employed are protected," (100 U. S. R., 264, page 25, *ante*) the power of the general protects the policeman, in other words the policeman exercises federal power, that is to say, power derived from the constitution and laws of the United States. This brings the policeman inside the protection of the great gospel of the Tarble case.

We use the word reverently. We have been following a learned but mistaken friend and trying to chase down a sophistry which he has invented to support an ingenious but falacious argument, and weary and footsore from our wanderings we are glad to get back to truth and home, and the great landmarks of the law which will tell to all coming time the mysteries of our form of government.

Permit an interjection. If the Tarble decision had been delivered long ago in Greece or Rome how we would love it and study it? Should we love it less because its author is living? We are jubilant. It is our salvation.

But how is this protection to be secured?" The answer is "*by the judicial power alone.*" (100 U. S. R., page 25, *ante.*) "If, whenever and wherever a case arises under the constitution and laws and treaties of the United States, the national government cannot take control of it, whether civil or criminal in any stage of its progress, its judicial power is at least temporarily silenced instead of being at all times supreme." (100 U. S. R. 262, *et seq.*; pages 32–3 *ante.*) The parallel between this illustration and the case at bar is complete. We were militia men of the United States (§ 1,625,

R. S. U. S.), acting under the direction of the commander-in chief of the army "in restoring this absent soldier to his regiment" (page 21, *ante*). In the illustration and in our case, there was "a restraint of liberty by a state agency acting within the state," but in both cases *the quality of the act is to be determined by the source of power, and not by the character of the agent.* (100 U. S. R. 346, and other cases cited on page 5, *ante.*) We say, therefore, that the jurisdiction of the state court does not attach to the proceeding for the reason given by our friend (page 43, *ante*), and he admits there is no other reason.

We hope these lines will meet his eye, for he is brave and noble enough to correct himself. He has done much to advance the study of the law of extradition, and we are confident he will do more as soon as he sees the opportunity, and he will see it before long.

The case of Cota which we have referred to (see pages 6 and 7, *ante*, 110 U. S. R., 385), is another demonstration of the error of the suggested rule which we are examining. Cota was confined on the Mexican gunboat, *Democrata*, commanded by J. O. Monasterio, commanding the Mexican fleet in the harbor of San Francisco. He was not in custody of a federal court, or court commissioner, or an officer of the general government acting under its laws. He was in the state of California. The agency was a Mexican gunboat. Here, one of our friend's conditions (*i. e.*, state agency), was not apparent, but it really existed. Cota had been arrested on a warrant issued by governor Perkins and delivered to Joaq. G. Conde, the Mexican consul. The state court issued its writ to the consul, but the prudence and moderation *of the consul* prevented a disgraceful conflict between the Mexican gunboat and the superior court which might have *involved a war* with Mexico. Most of the facts appear in the transcript. (*Re* Cota, 110 U. S. R., 385, Oct. term, 1883, No. 227.) The warrant of governor Perkins, if legal at all, was issued by "the authority of the United States" (13 Wall., 397) and the case belonged, under the Booth and Tarble decisions, exclusively to the federal judiciary. Could the superior court have enforced its process against that Mexican gunboat? Suppose the gunner of the gunboat had killed the sheriff while he was attacking the gunboat to serve the process of the superior court, could the superior court hang the slayer? We answer both these questions in the negative. We say that this illustration proves the invalidity of the rule suggested on page 43, *ante.*

The Maxwell case (pages 35 and 36, *ante*) invites us to ask, Could the state courts release Maxwell?

The general government in this instance is not "seeking" (29 Alb. Law Jour., 207) "to enforce a law of the United States against anybody. It makes no charge, frames no indictment, and holds nobody in custody. It is not in the act of exercising its authority against anybody. It has no relation to the case except that of having furnished through congress the law (§ 5,275, R. S. U. S.) by which the case is to be governed, and it is in this sense, and this only, that the case comes under the authority or color of authority of the United States. A state (Mo.) and not the general government is pursuing the remedy furnished by law." When Maxwell arrives in this country he will be in the custody of an agent of the state of Missouri for the purpose of answering to the justice of a state and not the United States. A state and not the general government will hold him in custody. *If* these views are correct (and they are suggested by Spear on extradition, 2nd ed., 515) it would follow that the state courts of California or Nevada could inquire on *habeas corpus*, whether Maxwell (while Maxwell is in the state whose courts are making the inquiry) is legally confined, and to remand him to the custody of the agent of the state of Missouri, if it appeared that the warrant held by the agent of the state of Missouri was in conformity with the statutes of the United States. We suggest that the power to remand is pregnant with the prisoner's right to be discharged if the right to hold him be imperfect.

This case fairly bristles with interesting possibilities. If Tracy should die in San Francisco, having Maxwell in custody, should Maxwell be allowed to go free?

True § 5,275 R. S. U. S. provides that "the president shall have power to take the necessary measures for the transportation and safe-keeping of such accused person" but he cannot do it in person. He may employ the army and navy, but must he do so? Can the president employ state agency to secure the prisoner, and if he does, can the state courts interfere by *habeas corpus* with the custody of the prisoner?

Suppose the custodian is dead and his successor not appointed, could a municipal policeman take and hold Maxwell? Would the policeman be subject to the state writ of *habeas corpus*, because "the imprisonment was by state agency, acting within the state"?

Suppose the United States marshal arrested Maxwell as an escape (the agent being dead), would the state courts have jurisdic-

tian to examine on *habeas corpus* the authority of the marshal? Would the fact that the marshal is an officer of the United States and the policeman is an officer of the state, make any difference in the jurisdiction to examine the questions we have suggested?

If the rule suggested by our friend is a valid rule, it would. We think it more reasonable to say it would not make any difference. The foundation fact in all the propounded questions is, the fact that Maxwell is in custody under *the authority of the United States*, as defined in the Booth and Tarble cases, and that no state writ can intrude into the sphere of the sovereignty of the nation. This supreme position of advantage can not be altered by death, or accident, or design, trick, artifice, or change of temporary custodians, because if it could, the supreme power of the nation could "be arrested at the will of one of its members," and this court has taught us to believe that such a thing could not be done (100 U. S. R., 263, page 32, *ante*), our own experience to the contrary, and the Stacy, Booth, Tarble and Casey cases to the contrary notwithstanding.

This change of custodians is the device which was adopted in the Cheong Ah Moy case (pp. 38–9, *ante*) in which, by making P. Connolly, sheriff of San Francisco, the respondent, it was conceived to bring the case within the condition that "the restraint of liberty is by state agency acting within the limits of the state" (page 43, *ante*), and thereby to make it possible for a state judge practically to reverse the judgment of the circuit court of the United States.

The fact that such an attempt was made, goes a long way to show that any rule which would promote such a result is not a good rule to adopt.

The Phœnix park case (pp. 36–7, *ante*) suggests the question: If the assassin should escape from his custodian in transitu, and a policeman arrest him under § 5,272, R. S. U. S., (page 36, *ante*,) would the state court have jurisdiction to discharge the fugitive? Here, we would have the conditions stated by our friend (page 43, *ante*), viz.: "A restraint of liberty by state agency acting within the limits of the state."

Here, as in the illustration given on page 50, *ante*, the general government is not "seeking" (29 Alb. Law Jour., 207) "to enforce a law of the United States against anybody. It makes no charge, frames no indictment, and holds nobody in custody. It is not in the act of exercising its authority against anybody. It has no relation to the case except that of having furnished through congress

the law (§ 5,272, R. S. U. S.) by which the case is to be governed, and it is in this sense, and this only, that the case comes under the authority or color of authority of the United States. A foreign government, and not the general government, is pursuing the remedy furnished by law." The prisoner in this case would be in the custody of a foreign officer or the agent of a foreign state for the purpose of answering to the justice of a foreign state and not the United States. A foreign state and not the general government will hold him in custody. *If* these views are correct (and they are suggested by Spear on extradition, 2nd ed., 515) it would follow that the state courts of California or Nevada could inquire on *habeas corpus*, whether the prisoner (while the prisoner is in the state whose courts are making the inquiry) is legally confined, and to remand him to the custody of the foreign state if it appeared that the warrant held by the agent of the foreign state, was in conformity with the statutes of the United States. We suggest that the power to remand is pregnant with the prisoner's right to be discharged if the right to hold him be imperfect.

If the foreign agent should die in San Francisco, having the prisoner in custody, should the prisoner be allowed to go free?

If the prisoner escapes, "it shall be lawful to retake the prisoner in the same manner as any person accused of crime against the laws in force in that part of the United States to which he shall escape, may be retaken on an escape." (§ 5,272, R. S. U. S., p. 36, *ante*.)

Suppose the prisoner escapes in California and flies to some other state in the United States and is arrested by a policeman, what kind of power does the policeman exercise? Is it federal, state or no power?

Suppose the foreign agent should die and his successor not be appointed, could a municipal policeman take and hold the prisoner? Would the policeman be subject to the state writ of *habeas corpus*, because "the imprisonment was by state agency, acting within the state?"

Suppose the United States marshal arrested the prisoner as an escape (the agent being dead), would the state courts have jurisdiction to examine on *habeas corpus* the authority of the marshal? Would the fact that the marshal is an officer of the United States and the policeman is an officer of the state make any difference in the jurisdiction to examine the questions we have suggested?

If the rule suggested by our friend is a valid rule, it would. We

think it more reasonable to say it would not make any difference. The foundation fact in all the propounded questions is, the fact that the prisoner is in custody under *the authority of the United States*, as defined in the Booth and Tarble cases, and that no state writ can intrude into the sphere of the sovereignty of the nation.

If, for these reasons, the state judiciary can take jurisdiction of the case, and deal with all the issues of law which may arise on the hearing, it would be possible for a single judge of a single state to defeat a foreign extradition which had been solemnly granted under the supreme law of the land.

The case of Linderman and Ahrens (p. 37, *ante*,) shows the mischief which results from the state judiciary interfering by *habeas corpus*, with the execution of a treaty. Here we had the precise conditions invented by our friend, "the restraint of liberty by state agency acting within the limits of the state." We find that the small fees that are charged in the federal courts, and the fact that state allows no fees to be charged in *habeas corpus* proceedings, invites sailor boarding-house keepers to harass the captains of foreign vessels by delaying the sailing of the vessel by getting out writs from the state courts, as was the case in this instance. The power of the national government to execute the treaty which she had made with Hawaii was arrested while the *state court* was considering whether the consul could or could not hold the deserters in case the vessel was bound for Europe (as she was) in place of sending them direct to Hawaii. That question was clearly a question of federal law, and clearly outside the sovereignty of the state.

In this instance we were detained about a week in the state courts, and during this time "the operations of the general government, in the execution of the treaty, were arrested at the will of one of its members," although it was said by this court in 1879 (page 32, *ante*,) that such a thing could not be done.

The case of Green (pp. 37–8, *ante*) is interesting as an illustration of the exercise of federal power by a state judge. What the outcome of the case may be, we do not know. But if the judge should hold Green for extradition, we are confident that the state supreme court could give him no relief on *habeas corpus*, and that judge Tooby in this case has the power of any judge of the United States, because it is derived from the same source and in the same quantity. (*Viz.* from § 5,270, R. S. U. S.) Nevertheless, it is true that Green is restrained of his "liberty by state agency acting within the limits of the state." If our suggestion be correct, the rule invented

by our friend (p. 43, *ante*) fails in this instance, as we think that it will fail in every other.

The rule suggested by our friend (p. 43, *ante*) might be examined by another test. (We quote from p. 43, *ante*.) "*State courts have assumed and exercised this jurisdiction for some reason.*"

The "*state court* (of Wisconsin) *assumed and exercised jurisdiction* (in the Booth and Tarble cases) *for some reason*."

Now, if this proposition is sound, it would be impossible for a court to exceed its jurisdiction, because if the state court did exercise jurisdiction, there must have been some reason for it (unless this suggested rule is worthless), and, as the supreme court of Wisconsin did exercise jurisdiction in the Booth and Tarble cases, there must have been "some reason;" therefore, there was a reason; therefore, the court had jurisdiction; therefore, this court was mistaken when it decided that the supreme court of Wisconsin had no jurisdiction in both of those cases.

Now, if the assumption of jurisdiction gives jurisdiction, then the Wisconsin court had jurisdiction, and although, it may have erred in judgment, still its decision was law until reversed, because the court had jurisdiction. But this court reviewed the decision of the Wisconsin court, and found that the Wisconsin court had no jurisdiction, therefore, its decision was never law.

The rule we are examining (p. 43, *ante*), proves the affirmative and the negative with equal force. What kind of a rule is that?

We submit that the reason which has been suggested (page 43, *ante*) for the exercise of this jurisdiction, fails to support the intrusion of the state courts into the sphere of federal power and authority.

We do not know of any decision of this court which justifies its exercise *on constitutional grounds*; we have cited many which expressly deny it. So far as we know, this is the first case which has come to this court in which the right to remove a *habeas corpus* proceeding from the state to the federal court has been presented for decision. If congress had passed no law vesting the *habeas corpus* power of the federal government in the federal courts, it might be claimed that the state courts, *from necessity*, should exercise the federal power until congress should "ordain and establish" the proper "courts" for its exercise. We have seen that on Sept. 24th, 1789, congress passed the "judiciary act" and that § 14 vested the *habeas corpus* power of the federal government in the circuit and district courts. (See §§ 752–3, R. S. U. S.) If §§ 11 and 12 of

the judiciary act control *habeas corpus* proceedings under the name of civil actions, § 14 of the same act would be insensible, tautological, and superfluous. The acts of congress are not so interpreted. Congress has been careful to provide in civil actions that the defendant shall have at least one opportunity to exercise his *right* to remove a civil action out of a hostile state court. In criminal actions the same right has been guarded. See 100 U. S. R. S., 262, 266, pages 32–3, *ante*; 1 Crim. Law Mag., 143–169.

If there is any decision which militates against this view it must be the one in Robb's case (111 U. S. R., 625) in which the court seems to rely upon the statute giving jurisdiction to the national courts, as not giving *exclusive* jurisdiction to the national courts in cases of *habeas corpus*, such cases being *civil* cases, as held in Tom Tong's case, 108 U. S. R., 557, and in Cota's case, 110 U. S. R., 385. The only question in Tom Tong's case was whether he had committed an offense, or, which is the same thing, whether the offense charged was within the constitutional power of the supervisors to create? Now, if Tom Tong's, or Robb's, case, being a *habeas corpus* case, is a civil case, and for that reason the state court has concurrent jurisdiction, under the judiciary act, then Booth and Tarble's cases must also be civil cases, and no more excluded by the judiciary act from the concurrent jurisdiction of the state courts than Tom Tong's or Robb's case. Both are seeking their civil remedies, and the question in all cases whether the offense charged was constitutionally created was but an incidental question. If there is concurrent jurisdiction in the state court to hear and determine one of those civil cases under the judiciary act of the United States, then there must be concurrent jurisdiction to hear and determine each of the others, for they are alike all civil cases and embodied in the same provisions of the act. There is no pretense that there is any other provision of the United States statute affecting the question. And it was just as necessary to require the production of the body in order to make the writ effective in Booth and Tarble's cases as in Robb's.

It seems impossible to distinguish the case of Robb from the Booth and Tarble cases, upon the statutory jurisdictional ground adopted by the court in the former.

This brings us to the question whether the jurisdiction of the state courts depends on the sovereignty of the court, or the form of the proceeding. We suppose that the state judiciary may, under grant of power from congress, administer federal law in some cases (*e. g.* §§ 1,014, 2,165 [naturalization], 5,270, 5280, R. S. U. S.), but

when they do administer federal law, they are for that occasion a part of the federal judiciary. But, even if a *habeas corpus* is a civil action, does this fact authorize the state courts to intrude their judicial process into the sphere of federal sovereignty, *when they know that the prisoner is within the dominion and jurisdiction of another government?* (Booth.)

There is no distinction made by any act of congress between our case and the Booth and Tarble cases.

If, so far as the legislation of congress goes, the state court has jurisdiction to deal with us, because a *habeas corpus* is a civil action, and the state courts may and can "inquire into the grounds upon which any person within their respective territorial limits is restrained of his liberty, and discharge him if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality, may arise from a violation of the constitution or the laws of the United States."

If, in other words, the jurisdiction of the state courts on *habeas corpus* is concurrent with the federal courts, on account of *the form of proceeding*, it would follow that the supreme court of Wisconsin truly had jurisdiction in the Booth and Tarble cases, and the erroneous judgment of the Wisconsin court should have been corrected by this court. In place of correcting it, this court found it invalid. Why? For want of jurisdiction. Why? "*Because no judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it was issued.*" (Booth).

But, if under the judiciary act, the jurisdiction of the federal courts on *habeas corpus*, is only concurrent with the courts of the several states, it would follow that the supreme court of Wisconsin truly had jurisdiction in the Booth and Tarble cases.

We apprehend that the science of the law consists in the application of the great principles of right and justice, written and unwritten, to the affairs of human life. In the Booth and Tarble cases, this court has enunciated a grand principle of law. This principle, like a piece of precious gold stamped with the image and superscription which denotes the national authority, is good for its full value whenever and wherever we may desire to apply it. This court has not *intentionally* overthrown the Booth and Tarble cases. We know this, because the effort is made to save them. But we respectfully submit that if, under the judiciary act and the act of March 3d, 1875, the state can exercise *habeas corpus* jurisdiction in

federal matters, there is no reason given in the judiciary act or any law of congress that we know of, why this *habeas corpus* power may not be exercised against United States marshals or army officers, as well as against any other person, state officer or private individual who exercises federal power under federal law. We do not see the value of any such distinction. The sanctity of the officer is the sanctity of the law which acts through him, and any person (not an officer in a technical sense) who exercises federal power under federal law is as much entitled to be protected, for the sake of the law which acts through him, as a United States marshal is or can be. We claim the protection of the Booth and Tarble rule. It is answered that we are not entitled to it because we are not officers of the general government acting under its laws. We reply: True we are not officers of the general government, but we are acting under its laws and therefore entitled to its protection, and also that the Booth and Tarble cases made no such limitation on the rule. The Booth case expressly expands the rule to protect all *agents* of the federal government. But we are told that congress has not excluded the jurisdiction of the state courts in *habeas corpus* proceedings where persons are held under color of authority of the United States. That we are amenable to the jurisdiction of the state court, although marshal Ableman, who held Booth, and the lieutenant who held Tarble were not amenable to the jurisdiction of the state court.

If congress has not excluded the jurisdiction of the state court in our case, it had not excluded the like jurisdiction in the Booth and Tarble cases. If the state court has jurisdiction over us on account of the form of the proceeding, then the state court truly had jurisdiction in the Booth and Tarble cases, because the form of the proceeding was the same. The Booth case holds that "*no judicial process* [from the state court] *whatever form it may assume*," can invade the sphere of national sovereignty.

What are the limits of this sphere? Some would answer the district of Columbia and a few scattered federal officers outside, with easy lines of retreat to the district. We answer differently, and claim all beneath the sky within our boundaries, which are the two oceans, Canada and Mexico. Alaska and the navy are included in our sphere. We find ourselves unchurched by the smaller definition, but we are equally certain that we are included in the larger one.

The Tarble case defines the authority of the United States to "an authority, the validity of which is to be determined by the constitution and laws of the United States," and declares that "*no writ of habeas corpus issued by the state court could pass over the line which divided the two sovereignties.*" These decisions read like prophesies. They are inconsistent with the existence of jurisdiction on account of the form of the proceeding in our case or in any case to which they apply. But if the jurisdiction does exist on account of the form of the proceeding, then *the Booth and Tarble decisions are virtually overruled*, because the form of the proceeding was the same in them as in this case. We see no way to save from the operation of this new rule "persons held in custody by authority of the courts of the United States or by the commissioners of such courts or by officers of the general government acting under its laws."

The Booth and Tarble decisions did protect the above described persons and all others acting under the authority or color of authority of the United States from the interference of the state courts, but when the foundation of those decisions is attacked and overthrown, the whole superstructure falls and nobody is protected because all defense is gone. These considerations tend to show that the jurisdiction does not depend on the form of the proceeding, but upon *the source of the power* which holds the prisoner, or which is affronted by his detention, and thus we are brought back to consistency and to the rule which we have already quoted, that the powers which the one sovereignty possesses, the other does not; they are established for different purposes; they have separate jurisdictions. (92 U. S. R., 550; 100 U. S. R., 267; 13 Wall., 396.)

When the United States turns its back to us in the hour of our necessity and refuses to protect us when we were enforcing its authority, we fall, but we do not fall alone, for with us fall the marshals of the United States and the officers of the army. They cannot be protected if we are not, and the situation is precarious and hazardous in the extreme.

Can it be questioned that § 14 of the judiciary act and § 752–3, R. S. U. S., vest the *habeas corpus* jurisdiction of the federal government in the circuit and district courts of the United States?

Then, "*so far as thus vested, it was withdrawn from the sovereignty of the state; to that extent the sovereignty of the state is restricted.*" (100 U. S. R., 267; page 13, *ante.*) We believe that there is only one decision—that in Robb's case,—which militates against this view, but if there is one it is important to discover whether it, or the line

of decisions to which it is contrary, is correct. If incorrect, it may do much harm, and the matter cannot be examined too soon.

We place the Booth, Tarble, Cruikshank, Tennessee, Virginia, Siebold and Yarbrough cases, re-inforced by McBride, Sims and Spangler from the state courts, and Sturges v. Crowningshield, 4 Wheat., 122; Houston v. Moore, 5 Wheat., 27; Prigg, 16 Peters, 614; People v. Moore, 14 How., 13, and sundry other cases on page 4, *ante*, on the one side, and this single case upon the other, and we confess our inability to reconcile them; there is an inconsistency which we cannot understand and we are humbly endeavoring to aid the court to give us the solution.

The distinction between a United States marshal holding a prisoner under a judgment of a United States district court, a United States commissioner and an officer of the United States acting under its laws on the one hand, and agents of the federal government on the other, is artificial, and if the state courts have jurisdiction on account of the form of the proceeding in the one case, for the same reason they have it in the other, and there is no reason (other than because this court has said so) why the federal officers, of the first class, should not be compelled to obey the state writ of *habeas corpus*, if the federal agents of the second class are subject to be compelled to obey it. When the reason for their protection is abandoned, the protection will soon fail.

They were protected in order to protect the federal government of which they were servants, from the disintegrating influence of state rights, as administered by state courts. But, if the state courts can deal in a *habeas corpus* proceeding with federal questions, provided they avoid the three classes of exempted persons, then they can decide the draft law, the acts governing the army or navy, or the fugitive slave law, or any other law of the federal government, to be unconstitutional by raising the question over the shoulders of a city policeman, as in this case. The mischief which would result from this construction, would soon suffocate the federal government.

We submit that jurisdiction in *habeas corpus* proceedings is not acquired by the state courts on account of the form of the proceeding, but that it depends on the sovereignty of the court, and that when the state court "*is judicially apprised that that party is in custody under the authority of the United States they can proceed no further.*" (Booth).

We have two governments. Neither is responsible to the other. Each is supreme in its own sphere. The powers of the federal gov-

ernment are few in number, but unlimited in the quantity of the power which it possesses. It can execute its powers on land and sea. It can choose its officers, agents, servants and administrators without question from any *person or power*.

It can harness the winds, the waves, the lightnings of heaven and the gases of the earth, and all the elements of earth and air and ocean and river; yes, even the passions and inclinations of men and beasts, and make them do its will. It can execute its laws by force on every inch of space within its jurisdiction. It can shoot upon the spot any man who attempts to haul down its flag as an affront to its authority. (See order* of John A. Dix, secretary of the treasury, January 29, 1861.) It can decide for itself whether the exigency was sufficiently perilous to justify so severe a measure. It can do all these things to execute its granted powers, and it can do these things without being subject to resistance or liability to be questioned *by any person or power within this land*. And if it cannot do them, it is no government! (See pp. 18–21, *ante*.) We submit that the enjoyment and exercise of these powers exclude any possibility of power in the state courts to question its agents.

"All who are employed are protected." We were employed and therefore we are protected. There is no sound rule which distinguishes between the protection which the government owes to its own *appointed* officers, and a volunteer acting solely under and by the authority of the constitution and laws of the United States who comes to her aid in the hour of her necessity. All who are employed are protected, whether they wear dusty feet or gold lace epaulets. When the power of the government was staggering under the wounds inflicted by the rebellion, Robert Small, a *negro slave*, in the harbor of Charleston, about 1862, delivered the rebel steamer Planter to the federal fleet. He bore no commission as an officer of the United States, and under the tests suggested by 29 Alb. Law Jour., 207, he would have been outside of the protection of the federal judiciary. He wore chains which had been riveted by the national

*Note— Treasury Department, January 29, 1861.

Tell lieutenant Caldwell to arrest captain Breshwood, assume command of the cutter, and obey the order I gave through you. If captain Breshwood, after arrest, undertakes to interfere with the command of the cutter, tell lieutenant Caldwell to consider him as a mutineer, and treat him accordingly. If any one attempts to haul down the American flag, shoot him on the spot.

John A. Dix,
Secretary of the treasury.

To W. Hemphill Jones, New Orleans.

constitution, but he saw the coming of the dawning day. His act might have been called treason by his immediate masters, and had he failed, his punishment would have been sudden and severe. But should *any person or power* within this land attempt to call him to account for that act, could the United States permit him to be questioned? If not, this protection must come from her judicial power alone, and not from the judicial power of the state which is making aggression on her authority. We think that these considerations tend to show that the jurisdic tion in *habeas corpus* does not depend on the form of the proceeding, but upon the source of power which is proposed to be examined, and that state power should be examined in state courts and federal power in federal courts.

We do not think that there is any state in this union which does not recognize the distinction between the inferior and superior judiciary. The trial of petty questions is committed to the inferior judiciary, but, even in such cases, there is usually provision for appeal under regulations which *save the rights of the parties.*

The matters confided to the superior judiciary need not here be enumerated; they are recognized as matters cognizable by courts of general jurisdiction, and among them we usually find appellate jurisdiction from the inferior judiciary, plenary jurisdiction to hear and determine, condemn and acquit, execute and discharge. It is to this division of jurisdiction that the *habeas corpus* power belongs, and for obvious reasons. The power to decide questions of sovereign power, life and death, to raise taxes, and to imprison or discharge, lie too near the heart of the sovereign to be handled by ignorant or careless hands.

We have seen (p. 40, *ante*), that the United States recognize the same subdivision of its judicial power, and that, for certain purposes, the state magistracy, superior and inferior, constitute a part, and a very large part, of the judicial force of the government of the United States. They are all *in the inferior grade*, and it belongs to the superior judiciary of the United States, to which none of the state magistracy belong, to deal with questions which come under the head of the general jurisdiction, and we have seen that the *habeas corpus* power belongs to this division of the law. No provision has been made to save the rights of the United State in *habeas corpus* proceedings in the state courts pending appeal, and it is incredible that congress could have intended to permit the state courts by the summary and searching proceeding of *habeas corpus*, to deal with

questions which were withdrawn from their cognizance in criminal actions, and only guardedly permitted to them in civil actions.

Take the case of the foreign captain acting under § 4,606, R. S. U. S., page 34–45, *ante*. Suppose an arrest by the captain, a riot on shore, a homicide by the captain, a state *habeas corpus* in which the prisoner of the captain is discharged by the state court on the ground that the act of congress is unconstitutional, (Booth's case) an indictment of the captain in the state court for murder, and an action in the state court for damages against the captain for slaying the deceased.

The captain can remove the civil and the criminal actions into the federal court, and in both cases the federal court decides in his favor, but the state court not being in accord with the federal court, and holding other opinions as to the law, releases the prisoner whose arrest was cause of all that followed, and the legality of whose arrest was the original question in dispute. The decision of the incidental questions could be directed as above shown into the federal courts, but the national sovereignty would in the above chain of circumstances be precluded from determining by her own judiciary the orginal question in dispute.

In the criminal and civil actions, the rights of the federal government are saved because the federal judiciary interposed. But in the *habeas corpus* proceeding, the rights of the United States were slaughtered by the state court, which held the law under which the captain acted, to be unconstitutional.

Any construction which leads to such inharmonious and contradictory results, must be erroneous. With proper deference we submit that the *habeas corpus* jurisdiction of the state and federal courts is not concurrent. "The power which one posseses the other does not." "They have separate jurisdictions." "The state courts cannot exercise concurrent jurisdiction without coming into direct collision with the laws of congress." (5 Wheat., 27; p. 12, *ante*.)

When we have a conflict of decisions of this court as in this case, every ray of light which we can throw upon the question is valuable.

We have two sovereignties, state and federal, and each has its writ. The proceedings under the federal writ are prescribed by §§ 751–766, inclusive, R. S. U. S. The state writ is regulated under §§ 1,473–1,505, inclusive, of the penal code of California.

We have seen that in the matter of naturalization (§ 2,165, R. S. U. S.) interstate extradition (§ 5,278, R. S. U. S.) and in many

other cases, some of which are suggested on page 6, *ante*, congress has conferred federal power on state officers. Now, if the state court had jurisdiction to issue and hear this writ, that power must be derived from some government or sovereign. (*a*)

If it came from the state it was state power, and if it came from the nation it was national power. *Which power was it in this case?* If it was state power, we have "the strange anomaly and forced construction" (Prigg, 16 Peters, 614) of a petty sovereignty questioning a superior sovereign, and we have seen (pages 32, 41–2, *ante*) that this court has said in the Booth, Tarble, Tennessee and Siebold cases, that such a thing *could not be done.*

(*a*) NOTE—

"There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States, and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And, although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independent of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by land-marks and monuments visible to the eye. * * * The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home, for, if this object could be attained, there would be but little danger from abroad; and, to accomplish this purpose, it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed, should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or state authorities. And it was evident that everything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals." (Booth 21 How., 506.)

Now, if the writ was issued under federal power (assuming, for the purpose of this argument, that the state court could issue the federal writ) it is manifest that the federal law must govern the proceeding. The writ should be in the name of the president of the United States as federal writs of *habeas corpus* are.

Our writ ran under the state form in the name of "the people of the state of California." (art. 6, § 20, const. of Cal.)

Under our new constitution (1879) we agreed (art. 1, § 3) not to go to war with the United States, not to question its officers or agents, and to treat them with proper respect "for their work's sake."

The writ of *habeas corpus*, as we all know, issues from the sovereign because it is the sovereign's pleasure to know why the party is confined. If good cause does not appear, the party is discharged. We have in our little case, the absurdity of the state of California by virtue of her sovereignty, questioning the sovereignty of the United States as to why she arrested this deserter.

The state court did not pretend to proceed under the federal law, nor did it issue the federal writ even if (for the sake of this argument) it had power to do so. When we examine "the statutes defining and regulating the jurisdiction of the courts of the United States," we do not find satisfactory evidence to support the idea that congress supposed that the state courts have jurisdiction to issue the federal writ of *habeas corpus*.

Congress has provided (§ 763, R. S. U. S.) for appeals to the circuit court in certain cases under the federal writ. Congress has provided in § 12 of the judiciary act and § 3 of the act of March 3, 1875, for saving the rights of the defendant, in certain civil actions, and in § 7 of the latter act has regulated the conduct of the *clerk of the state court*, but we search in vain in the *habeas corpus* chapter (XIII.) of the revised statutes for any regulation to save the rights of suitors, or of the United States, in the state courts under the federal writ.

No such lapse can be supposed to be intentional. We think the more reasonable view is that congress vested the federal jurisdiction in the federal courts. This court has said so in Bollman 4, Cranch. 75, and Milligan 4, Wall 2, and it has also said that "*so far as thus vested it was withdrawn from the sovereignty of the state; to that extent the sovereignty of the state is restricted.*" (100 U. S. R., 267, p. 13, *ante.*) It was said by this court in 1,820, "*The state could not exercise concurrent jurisdiction without coming into direct collision with the laws of congress; the jurisdiction was exclusively vested in the*

national courts, and could not be exercised by the state courts." (Houston v. Moore, 5 Wheat., 27, A. D. 1820; P. 12, *ante*.)

The same was held, as we have seen, in South Carolina, in 1839 (p. 12 *ante*), and Massachusetts in 1851 (p. 13 *ante*). This court, in 1858, in the Booth case (page 63, *ante*) declared that the two separate sovereignties acted, each by its own tribunals, independent of each other, and the Michigan case, in 1863 (pp. 8–11 *ante*), is of the same sound. We now come to the great Tarble case, 1872. "*If a party thus held be illegally imprisoned, it is for the courts, or judicial officers of the United States, and for those courts or officers alone, to grant him release.*" And, in 1875, we are taught (92 U. S. R., 550, p. 13 *ante*) "*the power which the one possesses the other does not, they are established for different purposes, and have separate jurisdictions.*"

We know, from the decision in the Robb case, that the court did not intend to overrule these decisions, because there is an expressed intention to save the cargo of the Booth and Tarble ships, but the vessels are scuttled so completely by the Robb decision, that they can never float again unless the damages are repaired, and if repair is deemed advisable there is no advantage in delay.

We learn from the decisions of this court that we have a dual government and that the United States can employ such agencies for the execution of its powers as its wisdom may select. That it may employ state officers as agents to execute its laws, and that when so acting, the power is not corrupted by the agent, but the agent is protected by the power.

There is no necessary connection, and, indeed, no connection in fact or in law, between the duties performed in the two distinct capacities in which they act. Congress might just as well confer the powers referred to upon any other persons as upon those named. The office is simply used instead of the name of the incumbent as a description of the persons upon whom jurisdiction and power are conferred. The jurisdiction and power to be exercised is derived solely from the act of congress, and not from their character as state officers. It was doubtless supposed that men occupying analogous positions under the state government would be competent to perform the services indicated, and that it would be more convenient and economical, in view of the small amount of services of the kind likely to be required, to confer the jurisdiction on them, than to maintain a separate set of officers. Whatever the reason, congress has seen fit, for certain purposes, to constitute certain state magistrates and certain state executive officers a part of the judiciary and executive force of the United States government; but while executing the laws of the United States by virtue of their powers thus conferred, their official acts are as separate and distinct from their official acts as state magistrates and state executive officers as if they held no state office whatever.

The power to act at all comes from congress and the United States constitution, and every person who lawfully performs any act under and by virtue of the powers conferred by the constitution and laws of the United States, whatever other official relation he may personally bear to the state, is necessarily, for that purpose, either an officer, agent, or other lawful instrumentality of the sovereignty of the United States, and necessarily *under the protecting power of that sovereignty.* The supreme court, in the Booth and Tarble cases, does not discuss the character of the agent or instrumentality used, the only question being, "*Is the party in custody under the authority of the United States?*" And it defines for itself the phrase thus used as "*an authority, the validity of which is to be determined by the constitution and laws of the United States.*" Is not the validity of the authority under which the plaintiff was held by defendants "*to be determined by the constitution and laws of the United States,*" *and by such constitution and laws alone?* "If so," proceeds the court, "the state court or judge "can proceed no further. *No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them.* And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal, or *other authorized officer or agent* of the United States, in any respect, in the custody of the prisoner, it would be his duty to resist it," etc.

When some splendid ship with valuable cargo and precious lives is wrecked, it is usual to inquire into the cause of the disaster. It is frequently the case that the captain or the pilot makes a mistake as to a landmark, or what amounts to the same thing, mistakes the true position of the vessel, and hence, the catastrophe.

Honesty, sincerity, and strong will, make the error all the more dangerous, and afford no protection against disaster, because, where these qualities are absent, caution is awake, but where they are present, we sleep with confidence. Having the chart before us, it is easy to see where the mistake was made. No one can doubt that our friend came honestly by his errors, as can be shown principally by himself. We quote from Spear on extradition 2d ed. 189, "in 1854, the law of extradition was very little known." "The occasion which led to this work was the diplomatic discussion between the United States and Great Britain in reference to the case of Winslow." (Id., p. viii.) "The field is, therefore, comparatively untrodden in the law literature of this country." (Id., p. vii.)

Our friend then entered the *field* through the Winslow gate, and when he had examined and discussed the law of foreign extradition, he addressed himself to the subject of interstate extradition. His mind was filled with shapes and forms borrowed from the law of international extradition, and finding the decisions inharmonious

and contradictory (as they are), he found enough of material to use in moulding the law as seen by him into the shape which suited his pre-conception.

It should not be a matter of surprise that under these circumstances he was prepared to see a demanding sovereignty and a delivering sovereignty. The delivering sovereignty being a state and not the nation. This view of the subject was supported by plenty of dicta from the efflorescent decisions of state courts, such as the following from *Re* Hibler, 43 Texas, 197, A. D. 1875: "This provision is the nature of a treaty* stipulation between the states, and is equally binding on each and all of the officers thereof in the absence of congressional legislation."

In the *Winslow* case the treaty was not kept, it was broken, and thus we see how easy comes the error that results from the use of an inappropriate word. Some use it because they desire to magnify the obligation to deliver the fugitive criminal, and others use it to express an obligation which can be broken with impunity, as the treaty was in the Winslow case. With one it means an obligation by no means to be broken, with others it means an obligation by no means to be kept if either party wishes to be free from the burden of the obligation.

In place of being an obligation to be broken with impunity, as the treaty with Great Britain was, in the Winslow case, our interstate extradition law is a much "*more perfect union.*" There are two parties to it, but they are not the demanding state and the delivering state; they are the demanding state on one hand, and all the people of all the states, acting through the federal government, on the other. The federal government may, if it pleases, use the state governor as its instrument to give effect to the national law (Smith, 3d McLean, 121), and if this method should be found unsatisfactory, it may devise and execute some other plan. (Prigg, 16 Peters, 614; 24 How., 106.) The nature of the obligation has been thus expounded by this court in 1842:

"Under the constitution, it is recognized as an absolute, positive right and duty pervading the whole union, with an equal and supreme force, uncontroled and uncontrolable, by state sovereignty or state legislation. It is, therefore, in a just sense, a new and positive right independent of comity, confined to no territorial limits and bounded by no state institutions or policy." (Prigg, 16 Peters, 614.)

* NOTE—Treaty defined; Holmes v. Jennison, 14 Peters, 572.

There are probably more than a dozen decisions by the state courts in which the obligation is spoken of as being in the nature of a treaty obligation. In general, the tenor of the decisions is that the right of the demanding state to claim, and the correlative obligation of *the proper authority* to deliver, fugitives from justice is an obligation as solemn as a treaty, by no means to be broken, but to be faithfully kept, anything in the constitution and laws of the states to the contrary notwithstanding. This is the sense in which it is used in 43 Texas, 197, and most of the other decisions.

We say in regard to this deliverance that whether "this provision" was or was not "in the nature of a treaty," binding or not "binding in the absence of congressional legislation," could not possibly be an issue before any court in Texas in 1875, because congress had legislated on the subject in 1793, which legislation is still in force. The language of the court may have been harmless, if understood in the sense in which it is used, but misleading if used in a different sense. But whether harmless or hurtful, we contend that the provision is not in the nature of a treaty, but of a higher nature, to wit, "a supreme force pervading the whole nation; uncontroled and uncontrolable by state sovereignty and independent of comity." (Prigg, 16 Peters, 614, *supra.*)

We notice that the Romaine case, 23 Cal., 589, A. D. 1863, denies the "power of congress to regulate this subject," and the Manchester case, 5 Cal., 237, A. D. 1855, holds "the extradition of the subject to be a dangerous power which ought not to be entrusted to the executive alone and which should be watched by the state courts!"

Against these crude suggestions we place the interpretation of the congress of 1793, the matchless reasoning of the Prigg case, 16 Peters, 614, A. D. 1842 (which by this reference we incorporate in this part of this argument), the Sims case, 7 Cush., 285, A. D. 1851, and Kentucky v. Denn, 24 How., 104, A. D. 1860. "Over the subject thus surrendered the sovereignty of the state ceased to exist." (Tenn., 100 U. S. R., 267—1879, p. 13, *ante.*)

The conclusion is inevitable, and we shall not mar its force by superfluous argument.

We submit that the men who made the constitution and who organized the government under it and put it in motion, knew something about the meaning of its provisions.

The governor of Virginia in 1791 did not think he had power to execute the provision of the constitution in the absence of congressional legislation, and the result was the passage of the "act con-

cerning fugitives from justice and persons escaping from the service of their masters," of February 12, 1793, which is perpetuated in §§ 5,278–9, R. S. U. S. We pause to remark that if the provision we are examining was in the nature of a treaty, the next following provision providing that the slave "*shall be delivered up*," must be in the nature of a treaty also. The nature of both of these obligations had been so fully expounded in Prigg v. Com., 16 Peters, 614, that we deem it unnecessary to add anything to what has been said so well. We do say that neither cotemporaneous practice, legislation, nor history shows this provision to have been regarded by the fathers and founders of our government as being in the nature of a treaty obligation. Between independent sovereignties a refusal to surrender a fugitive criminal may be a cause of war. The states of this Union have no power to go to war on this subject or any other except to sustain the supremacy of the national government.

The obligation is not that the states shall surrender criminals, but that the fugitive "shall be delivered up."

How? By whom? That is left with congress to provide for.

We learn from 24 How., 100, that as early as 1643, articles of confederation were made between Massachusetts, New Plymouth, Connecticut and New Haven, "for the apprehension and delivery of fugitives from justice." That when the thirteen colonies confederated a similar provision was adopted. And when the people of the colonies adopted the national constitution "to form a more perfect union, *establish justice*, insure domestic tranquility, and promote the general welfare for themselves and their posterity," this solemn pledge was made: "*A person charged in any state* [the word state here used means a place in which there is a government having power to punish crime, from the punitive power of which government the fugitive is supposed to fly] *with treason, felony or other crime who shall flee from justice and be found in another state* [the word state here used means place within the jurisdiction of the United States, and includes the district of Columbia and the territories] *shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdction of the crime.*" Immediately on the adoption of the constitution the doubt arose whether legislation by congress was required to enforce the national obligation.

This doubt was solved by the act of congress of February 12, 1793. This act was carefully considered by the supreme court of Massachusetts in 1851, and the court said:

"The evils existing immediately before the adoption of the constitution, and the greater and more appalling evils in prospect, indicated the absolute necessity of forming a more perfect union, in order to secure the peace and prosperity of all the states. This could only be done by the several states renouncing and relinquishing a portion of their powers of sovereignty; and these were the right of war and peace, the right of making treaties with foreign powers and with each other, and the right of exercising absolute power and dominion over all persons and things within their own territories respectively. In order to form this more perfect union, delegates from the several states met together. It was obvious that the renunciation of some of the powers of sovereignty, at least to the extent above mentioned, was the first step to be taken, and was absolutely essential to the success of any scheme of union. * *

"And the theory of the general government is, that these subjects, in their full extent and entire details, being placed under the jurisdiction of the general government, are necessarily withdrawn from the jurisdiction of the state, and the jurisdiction of the general government therefore becomes exclusive. And this is necessary to prevent constant collision and interference; and it is obvious that it must be so, because two distinct governments cannot exercise the same power, at the same time, on the same subject matter. This is not left to mere implication. It is expressly declared in art. 1, § 8, ¶ 18, that congress shall have power to make all laws which shall be necessary and proper, for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. * *

"The act of 1793 was passed at the second congress, so soon after the adoption of the constitution, that many of the members may be well presumed to have been members of the convention, and all of them to have been intimately conversant with the great principles of the constitution, and with the views, intentions, and purposes of its framers. This species of contemporaneous construction has ever been regarded as of great weight and importance, and is entitled to the highest respect. It bears with a great weight of authority upon two points; first, as to the power and duty of congress to pass laws to secure and carry into effect a right confirmed by the constitution of the United States; and secondly, as to the fitness of the provisions of law thereby adopted, and their adaptation to the proper and practical assertion to the right secured by the constitution. * *" (Sims, 7 Cush, 299.)

The same views are expressed (A. D. 1858.) in Booth's case, from which we quote on page 63, *ante*, and (A. D. 1879) in Tenn., quoted on page 13, *ante*.

The true meaning of article 4, § 2, is that each of the sovereign states should be unimpeded, and absolutely free from any obstruction from any of the other states in the administration of its justice. That there should be no asylum for criminals anywhere. That the justice of each state as administered by its own courts should not be disputed or interfered with or retarded by any other state.

In order to do this, each state surrendered its right to grant an asylum to any fugitive, and in return for this surrender of a portion of its sovereignty, it received the pledge of all the others, given, not as states, but by the people of the new nation, that its justice should not be disparaged, nor its right to administer it be rendered abortive by reason of any exercise of sovereignty by any of the states of the new union. And all the people of all the states consented to the obligation and signed the bond.

The obligation is not created by the states, or between the states. The people surrendered a certain contribution of power to form a federal government. Each state surrenders the right to make a treaty with any other state or with any foreign country. (Holmes v. Jennison, 14 Peters, 562–598, A. D. 1840.)

Each state surrenders the right to use force against the national government, the right to grant an asylum to any person charged with crime who flees from the justice of any of the states, and the absolute rights of sovereignty over persons, territory, and things which it would have possessed if the national government had not been formed. (Re Sims, 7 Cush. 299, 100 U. S. R., 267.) In return for this surrender, the state gains the pledge of the national government that her fugitive criminals shall be delivered up.

How was this obligation to be enforced? Was it contingent on state legislation which might be inharmonious in the different states, or should congress provide for its execution under article 1, § 8, ¶ 18, of the constitution?

It was held by this court that the constitutional obligation required the aid of legislation, "to protect the right and enforce the delivery." That "the national government is clothed with appropriate authority to enforce it, and can do it by its own officers." That "the legislation of congress has not exhausted its power. That state legislation on the subject is excluded. And that the object requires that it should be controled by one and the same will throughout the whole union" (Prigg v. Com., 16 Peters, 614, A. D. 1842); because "it is *necessary* that the jurisdiction of the national government should be exclusive in order to prevent constant collision and interference; because two distinct governments cannot exercise the same power at the same time over the same subject matter." (Re Sims, p. 70 *ante*.)

Why should we, at the commencement of the second century of our national existence, import the complications of the Winslow controversy into our interstate extradition law? The fathers who made

our national constitution knew how to keep an obligation as well as they knew how to make one. It requires the ingenuity of a law writer, whose ability we acknowledge, to find anything "complex" in our interstate extradition law. It is significant that no complications were discovered in the enforcement of this law until after the generation which gave us the fathers had passed away. It was not until the passions which culminated in the civil war began to kindle that the sovereignty of the state asserted itself in opposition to the execution of this national obligation. Virginia, in 1839, and Kentucky in 1859, found the national government insolvent in regard to the performance of this national right and duty. Perhaps, if at the inception of these troubles, the rights of the United States to hush discordant voices, and the power of the United States to execute her laws, had been understood as we now understand them, and asserted as we are now endeavoring to assert them, there might have been no war.

The cancer of slavery might have been cut out by the knife of legislation, with compensation to the owners, in this as it has been in other countries. We, not as wise as other nations, burned it out with the flames of civil war. If the obligation to deliver fugitives from justice was of sufficient importance to justify its insertion in the national constitution when we had but thirteen states and three millions of people, is it not important when we have thirty-eight states and fifty millions of people to rescue it from the perversion which would result from the grafting of a foreign scion upon our national stock, and thus changing the nature of the tree which our fathers planted. There is and can be no such thing as the exercise of the sovereignty of the state where the fugitive is found in opposition to the national will in the matter of inter-state extradition without a violation of the national constitution.

"The constitution equally cuts off the power of the states to agree with each other as with a foreign power. * * The constitution provided for the exercise of the interstate extradition power contrary to the will of a state in case of an unjust refusal, thereby settling as among the states the contested question whether on a demand *the obligation to surrender was perfect and imperative*, or whether it vested in comity and was discretionary." (By Mr. justice Catron, Holmes v. Jennison, 14 Peters 597, A. D. 1840.)

"There is and can be no such thing as the exercise of plenary sovereign power over the same thing at the same time and place by two sovereignties." (Sims, 7 Cush, 299; p. 70 *ante*.)

Plenary power is non-existent when one sovereign can question the other, and all sovereignty of the minor sovereign over the subject matter is extinguished when the major sovereign can control the minor. In the matter of interstate extradition we claim that the United States is the major sovereignty. And that there is, and can be no minor sovereignty in opposition to the national will.

In Taylor v. Taintor, 16 Wall., 373, 1872, we find that McGuire committed burglary in Maine. Afterwards he was arrested in Connecticut for grand larceny and gave bail of $8,000, and, having *indemnified his bondsmen*, he went to New York, where he belonged. The governor of Maine demanded him, and he was taken to Maine, convicted, and sentenced June, 1867, to 15 years' imprisonment. Suit was brought in Connecticut on the bail bond, and the bail sought to escape payment on the above facts. This court said McGuire " violated the law of Maine, and thus put in motion the machinery provided to bring him within the reach of the punishment denounced for his offense."

Among other matters, Mr. justice Swayne remarked: " In such cases the governor acts in his official character, and represents the sovereignty of the state in giving efficacy to the constitution of the United States and the law of congress. If he refuse there is no means of compulsion."

It is worthy of notice that two justices of this court did not sit in this case. Justices Field, Clifford and Miller dissented. The remainder of the court were the chief justice, and justices Swayne, Bradley and Strong. There was no issue in this case as to whether the governor represented the sovereignty of the state or sovereignty of the United States, or whether there were or were not means of compulsion in case of refusal. Consequently there could be no decision of either of these questions in this case. Fairly used, the language is not misleading. We learn from 24 How., 107, that at an early period in our national history, the United States government leaned heavily on state officers for active aid in the enforcement of federal laws. That in course of time it was found that these matters subtracted the state officer too much from his duties to the state. Some doubted the compatibility of one officer serving two governments, perhaps on the assumption that the superior service of the federal government created a vacancy in the state office held by the servitor. In order to satisfy the latter cavil, many states passed laws authorizing their governors to act in enforcing the extradition law of congress. Some states have forbidden their

courts to naturalize aliens under § 2,165, R. S. U. S., other states, as California (article 6, § 5, constitution) accept the power and encourage their courts to administer it. Seen in this aspect, the state consented that her governor should be a servitor of the national government in the execution of the interstate extradition provision of the national constitution, and, as the governor by virtue of his office is not subject to the compulsion of the national government in this matter, it may have been that the state was willing to subject him to her own power of impeachment to be used in case of emergency. (*Re* Smith, 3 McLean, 121.) The state in her sovereign capacity consented that her governor should act as an agent of the national government in the execution of the national interstate extradition law. In this limited and qualified sense, viz.: that the state consented that he should act, it was true that the governor represented the sovereignty of the state, but the state could not control his action or teach him how to act, and we might go farther and say that the state could not forbid him to act, prevent him from acting, or punish him for having acted. Any attempt to do so would be contrary to the supreme law of the land (constitution United States, article 6, § 2), and would be arrested by the federal judiciary as soon as agitated. More than this, the learned justice could not have meant, and even this expression is beyond the issues in the case. Will it be disputed that congress could devolve the interstate extradition power on the federal courts as suggested (*a*) by chancellor Kent?

Note (a). "The provision in the constitution of the United States is not, however, to be regarded as a null and void provision, or resting on the mere will and pleasure of the state authorities. It is a substantive and essential grant of power by the people of the United States to the government of the United States, and it partakes of a judicial character, and is fitly and constitutionally of judicial cognizance. The judicial power of the United States extends to all cases in law and equity arising under the constitution, and the courts and judges of the United States within the state to which the fugitive has fled are the fittest tribunals to be clothed with the exercise of this power, so that the claimant might, on due application with the requisite proof, cause the fugitive to be arrested and removed or surrendered by the marshal of the district, under regular judicial process by habeas corpus. To such a course of proceeding, and to such a source of power, I should rather apprehend the act of congress ought to have applied, and given facility and direction. Such a course of proceeding would be efficient, and more safe for the fugitive, and more consistent with the orderly and customary administration of justice. It concerns the common interest and intercourse among the several states, and is a branch of international jurisprudence." (By chancellor Kent, 2 Kent's com., 32.)

See, also, Voorhies, Vroom., 141, A. D. 1867.

"If state governors should defeat the operation of the law it would be competent for congress to provide some other means." (Spear, 300.)

If congress should confer this power on the federal courts or upon extradition commissioners in each state, where would the sovereignty of the state be heard of in a case of interstate extradition? The fact that congress has been deferential towards the states in devolving this power on the governors does not alter the source or quality of the power, or invite the exercise of a resistant will in a matter which, under the constitution, is committed to congress and by congress committed to the distinguished citizen of the United States, who, for the time being, shall be chosen in each state to the high office of chief magistrate of each state. Is not this the same as if congress had provided that the agent to respond to the extradition demands of the state governors should be elected from time to time in the several states?

It is true that in the existing state of the law there is "no means of compulsion" upon the state governor: 24 How., 106. But this is not the whole truth. We learn from Mr. justice Catron that "the constitution provides for the exercise of this power contrary to the will of the state," (14 Peters, 579), and from Mr. justice Story, that although "the state cannot be compelled to enforce the provisions of article iv. of the national constitution, the natural conclusion is that the national government is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution." (16 Peters, 614, A. D. 1842.)

We most deferentially submit that the adoption of these views does not tend to establish a proposition which we deprecate, namely, that "the transporting of a person beyond the limits of the state in which he resides or happens to be to another state depends entirely on the arbitrary will of the executive authorities of the state demanding and of the state surrendering him." The case of Smith, 3d McLean, 121, shows that the federal judiciary are quite equal to the task of correcting any abuse or misapplication of the interstate extradition law of congress.

The demanding governor can exercise no arbitrary will. He must act, like other judges, on the facts as known to him from legal evidence; the will to which he gives expression is the will of the law, which for the moment finds its utterance through its executor. The responding governor in like manner acts under the highest pos-

sible public obligations in the performance of this great national duty. He can revoke the mandate which he issues if he finds he has been imposed on.* The mandate is not the mandate of the individual who signs it, but the mandate of all the people of all the states acting through the agency which they, through their congress, have created for the execution of their will. An instant and immediate delivery is neither necessary nor proper. All time required for proper investigation can and should be taken, and the prisoner should in all cases have access to the federal judiciary, if he so desires, for the protection of his rights.

We think this procedure is clearly implied in the present law of congress, and if any abuses or hardships have existed under the previous administration of the law, the remedy should be sought in a closer adherence to its true intent and meaning, and not in a wider departure from one of the solemn obligations which our fathers made when they laid the foundations of our government. Arbitrary will is excluded in the proper execution of the law as written in the constitution and the act of congress of our fathers. It does find utterance and expression in the occasional discharge by the state judiciary of persons who, under the constitution and laws, should be delivered to the demanding state. These discharges being made without any saving of the rights of the demanding state or of the United States.

We do most respectfully ask the attention of the court to the mischief which has resulted, and may result, from the exercise of this arbitrary will by state judges, uncontroled by appellate power, and irresponsible to the corrective authority of the federal judiciary. On March 25, 1858, Edwards and Spannier were discharged on *habeas corpus* by a district judge in San Francisco, the point being that a territory (Oregon) could not make a requisition on a state. The result was that one of these men pursued a criminal career for years, in California, murdered a policeman in Sacramento, was convicted of several crimes, sentenced to forty-eight years, and escaped to pursue his criminal instincts elsewhere. This erroneous decision impeded and prevented the execution of the laws of the United States, and of the state, for five years. No appeal was given by law. The prisoners were at liberty. The agent of Oregon has no interest to correct this erroneous decision after he lost his prisoners.

NOTE—"He may grant a rehearing of the case and revoke the warrant." (Spear, 440.)

The cruel slaughter of Magruder and his ten companions in the wilds of Idaho, at night, while asleep, in camp, for the purpose of robbery, by the treacherous sentinels, in whom the sleepers trusted not wisely, but too well, brought a strain upon this legal cobweb which it could not stand, and we have the result in Romaine, 23 Cal., 585, A. D. 1863, in which the Edwards error of 1858 is distinctly overruled.

Romaine, Renton, Lowery and Page, were sent back to Idaho and hung (except Page, who confessed and testified,) in sight of the residence of the widow and orphans of the leader of the party which they had slaughtered. On October 24, 1866, Donahue was discharged on *habeas corpus* by a district judge in San Francisco, on the ground that he could not be detained in anticipation of a demand from the governor of Oregon for his delivery for murder.

This decision remained an obstruction to the administration of justice for nine years, until the supreme court of the state, in Cubreth, 49 Cal., 437, A. D. 1875, established the contrary proposition.

We would compare this irregular, disjointed and pernicious procedure with the symmetry and safety of the federal practice as regulated by chapter xiii., R. S. U.S.; and instance the case of Keinappel, who was demanded by Washington territory from the governor of California, in 1884. He had his *habeas corpus* in the United States district court. The case was appealed to the circuit court, and in this way the judgment of the highest federal tribunal was obtained speedily and without jeopardy to the rights of the parties. The case of Bull & Turtle, 4 Dill., 323, is another instance of the safety and expediency of the federal system. Here the judgment of the district court, discharging the prisoners, was reversed.

It is very hard to believe that congress intended—when it selected the governor of the state as the agent of the federal government for the execution of the constitutional duty of delivering fugitives from justice on demand of the states—to permit the action of the governor to be defeated and nullified by the lowest grade of state *habeas corpus* judges without appeal or any provision for the correction of their errors. Even the coolies who are landed in San Francisco have the benefit of the appellate jurisdiction of the circuit court of the United States. Under the administration of the state judges in the instances of Edwards and Donohoe, the commonwealth of Oregon was denied her rights under the constitution and laws of the United States—without appeal—by the erroneous decisions which

we have cited. The injury to the administration of justice was without remedy, and the consequences irreparably mischievous. It is not easy to believe that congress intended that a state should be denied a hearing in a federal court on so important a matter, when such ample provision is made for other questions.

We read (in Spear, 2d ed., 428, 513, 547, 550) the transaction "*in inter-state extradition is between distinct, independent and sovereign states.*" If this be so, and even if it be not so (and we think that it is not), the following extracts from the decisions of this court are worthy of consideration. "It is true that in this case the extradition was international, yet the principles of law applied to it (by this court) hold equally good in inter-state extradition." (Spear, 532.)

"Analogous to international extradition." (Spear, 550.) "There is no distinction between these two forms of extradition." (Spear, 551.)

"And if this power remains with the states, then, every state of the union must determine for itself the principles on which they will exercise it, and there will be no restriction upon the power, but the discretion and good feeling of each particular state.*

"Whether it be exclusive or not is another question, of which we shall hereafter speak. But we presume that no one will dispute the possession of this power by the general government.*

"Whatever is granted to the general government is forbidden to the states, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former.*

"It must be remembered that states can act only by their agents and servants; and whatever is done by them, by authority of law, is done by the state itself.*

"The exercise of the power in question by the states, is totally contradictory and repugnant to the power granted to the United States.*

"The power in question, from its nature, cannot be a concurrent one, to be exercised both by the states and the general government. It must belong, exclusively to the one or the other.*

"And it being conceded on all hands, that the power has been granted to the general government, it follows that it cannot be possessed by the states, because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government.*

"And that, whenever the terms in which a power is granted to congress, or the nature of the power requires that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.*

"We are altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, to be effectual; and, at the same time, compatible with one another.*

"And how could this great national power be exercised with uniformity or advantage, if the several states were, from time to time, to determine the question? One would probably determine to surrender for one set of offenses; another, another."*

* By justices Taney, Story, McLean and Wayne, 14 Peters, 568-9, 571-3-4-5-5-6—8-8.

"I further admit, that if a treaty had been made, by which the federal government had bound itself to surrender fugitives to a foreign nation, and one had been arrested under the treaty for the purpose of being surrendered, and the judicial authority of Vermont had discharged him upon *habeas corpus*, then it might be said that such discharge was repugnant to the treaty."‡

‡By Mr. justice Barbour, 14 Peters, 589.

"There is no such difference between international and interstate extradition as to imply that this theory is not equally applicable to both. The essential principles of both are the same." (Spear, 569.)

The importance of the question we are discussing, justifies a comparison of our views, and the views of our opponent, with the authoritative expositions of the law which have been given by this court. The following gem of thought, from Mr. justice Baldwin, 14 Peters, 618, shall be our monitor to tread with pious feet upon this holy ground.

"The power of this court is moral, not physical; it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts; not by its mere authority as a tribunal, from which there is no appeal; and if ever its solemn decisions should be overlooked by itself, or we should cease to respect those of our predecessors, the people and the states will still adhere to them; and our successors will refuse to follow our deviations from the ancient path."

OUR CONTENTION.	THE ANTITHESIS.
1 "The duty of providing by law the regulations was manifestly devolved on congress. The duty of the governor is merely ministerial without the right to execise executive or judicial discretion." (Ky. v. Den., 24 How., 104, A. D. 1860.)	*a* "If chief justice Taney (in 24 How., 66) meant that the duty i s so purely ministerial, &c., then the opinion is clearly not cor rect." (Spear, 430.)
2 "The object was to provide a national assurance that offenders against the criminal laws of one state should not find a sanctuary in the domain of another." (3 Voorhies, 3 Vroom., 141, A.D. 1867.)	*b* (NOTE.—This decision is by a full court consisting of Taney, c . j. and McLean, Wayne, Catron, Nelson, Grier, Campbell, and Clifford, jj. It was argued with eminent ability by most able counsel, elaborate briefs were submitted, and if it can be set aside by brush of an author's pen the science of the law is in a state of chaos.)
3 "The purpose of the constitution was to provide an absolute obligation to surrender criminals. No state can refuse to surrender, because the right to require such surrender is a part of the sovereignty of the nation." "The rule is imperative." "No discretion remained with the executive of the state to which the fugitive had fled." "The right to demand implies an absolute right, there must be a correlative obligation to deliver." (Voorhies, 3 Vroom., 141, A. D. 1867)	
4 "The exercise of the power in question by the states is totally contradictory and repugnant to the power granted to the United States." (14 Peters, 574.)	*c* "Interstate extradition is transaction between two independent and sovereign states." (Spear, 513, A. D. 1884.)
5 "The power cannot be possessed by the states." (14 Peters, 575.)	
6 "How could this great national power be exercised with uniformity or advantage, if the several states were from time to time to determine the question?" (14 Peters, 578.)	*d* "Interstate extradition is a transaction between these separate, independent and sovereign states; the state governors represent the sovereignty of the states

7 "The constitution cuts off the power of the states to agree with each other." (14 Peters, 597.)
8 "The constitution provided for the exercise of the power, contrary to the will of a state." (Ib.)
9 "The obligation is imperative and not discretionary." (Ib.)
10 "The language of the constitution is *imperative* as to the obligation." (Spear, 422.)
11 "The duty of causing (the fugitive) to be arrested and delivered up is imperative." (Spear, 432.)

12 "The subject is as completely taken from the states as if they had been forbidden to act." (Prigg, 16 Peters, 614.)
13 "It would be more objectionable to suppose that such a power should be confided to state sovereignty." (Prigg, 16 Peters, 614.)
14 "Some states may refuse to act at all." (Ib.)
15 " The right and duty are dependent solely on the act of congress. It is an absolute, positive right and duty pervading the whole Union with an equal and supreme force, uncontroled and uncontrolable by state sovereignty." (Prigg, 16 Peters 614, 1842.)
16 "The national government is clothed with the appropriate authority to enforce it." (Prigg, 16 Peters, 614.)
17 "The theory of the general government is that those subjects within their full extent and entire details being placed under the jurisdiction of the general government, are necessarily withdrawn from the jurisdiction of the state and the jurisdiction of the general government therefore becomes exclusive." (16 Peters, 614, A. D. 1842; Sims, 7 Cush., 285, A. D. 1851; Booth, 21 How., 506, A. D. 1860; Tennessee, 100 U. S. R., 267, A. D. 1879; p. 13 *ante*.)
18 "The provision of the constitution, is a substantive and essential grant of power by the people of the United States, to the government of United States." (2 Kent, 32.)
19 "A person charged &c., shall be delivered up." (Art. 4, § 2, constitution United States.)
20 "To cause the fugitive to be delivered &c." (Act of February 12, 1793, § 5,278, R. S. U. S.)
21 "To refuse to deliver a fugitive from justice would be an open, palpable violation of the constitution of the United States." (13 Ga., 133, 1853.)
22 "The question whether this law is constitutional was considered (16 Peters, 539) and its constitutionality affirmed so far as giving the authority to the governors of states and territories. There is no question as to the validity of the law." (Spear, 423.)

23 "The object requires that it should be controled by one and the same will throughout the whole union; therefore, the power of the United States is exclusive." (Prigg, 16 Peters, 614, A. D. 1842; Sims, 7 Cush., 299, A. D. 1851; 100 U. S. R., 385, A. D. 1879; p. 18 *ante*.)
24 "The constitution creates an absolute right and imposes an absolute duty, operative in every state and upon every state." (Spear, 293.)

for which they act." (Spear, 547.)
e "Extradition is a transaction between two sovereign states, for the purpose of public justice." (Spear, 550.)

f "The constitution and the law make it the duty of the *asylum* state to give the necessary consent when and only when" &c. (Spear, 552.)
g "States in which fugitive criminals have sought *asylum*." (Spear, 445.)

h "Nor is any power conferred on congress." (Romaine, 23 Cal., 582, 1863.)

i "It appears that in the matter of interstate extradition, two sovereign states proceeding under the constitution and the law hold intercourse with each other." (Spear, 428.)

j "Interstate extradition is between distinct, independent and sovereign states." (Spear, 550.)
k "A state surrendering a fugitive criminal, acts as a sovereign nation and exercises the prerogatives of a nation. The question belongs exclusively to these two states, and their intercourse with each other is that of separate and independent states, as much so, as if they were separate and independent nations." (Spear, 551.)
l "Other states not involved have nothing to do with it, the general government has nothing to do with it." (Spear, 551.)
m "The *surrender* by the state." (Spear, 547.)
n "A fraud upon the *surrendering* state." (Spear, 549.)
o "A state *surrendering* a fugitive" &c. (Spear, 551.)

25 "The proceedings in extradition rest upon the supreme law of the land, and no state can constitutionally legislate so as to interfere with or defeat these operations." (Spear, 330.)

26 "No discretion is invested in the governor, it is his imperative duty to issue his warrant of extradition." (Spear, 433.)

27 "The duty of surrender is imperative." (Spear, 433.)

28 "The function of ordering the arrest and delivery of fugitive criminals is exclusively committed to the governor of the state or territory to which they have fled." (Spear, 441.)

29 "The constitution assumes that the governors of states will be men of common sense." (Spear, 387.)

30 "The governors of states are authorized to exercise this special power given them by congress, without any state legislation bestowing it." (Spear, 424.)

31 "The governor of a state is as independent in his sphere as the courts of justice in their sphere." (Spear, 426.)

32 "If he refuses, there is no power in the general government, or in the state of which he is the executive, to compel him." (Spear, 426.)

33 "He is by the law of congress, the sole depositary of the power." (Spear, 427.)

34 "No other authority than the governor can under the present statute order the arrest and delivery." (Spear, 567.)

35 "If congress had chosen to vest the power in a different agency as it might have done, these state governors would have been wholly without power." (Spear, 562.)

36 "If state governors should by refusal to deliver up fugitive criminals, defeat the operation of the law, it would be competent for congress to provide some other means of attaining that end." (Spear, 300.)

37 "If the agency were purely federal, the jurisdiction would be exclusive in the federal courts." (Spear, 517.)

38 "Congress might have established a purely federal agency for the arrest and delivery of fugitive criminals." (Spear, 427.)

39 "The execution of the laws of the United States and the judicial determination, of questions arising under them are confided to another sovereign and to that extent the sovereignty of the state, is restricted." (100 U. S. R., 267; page 13, *ante*.)

40 "Congress has power to enforce its regulations. (100 U. S. R., 387.)

41 "The state court may administer not only the laws of the state, but equally federal law in such a manner as to paralyze the operations of the government." (100 U. S. R., 262, 1879.)

42 "The act of 1793 bears a great weight of authority, upon the fitness of the provisions of law, adopted by congress, and their adaptation to the proper and practical assertion of the right secured by the constitution." (Sims, 7 Cush., 285, A. D. 1851)

43 "The power is not official in the governor but personal. It might have been granted to anyone else by name, but considerations of convenience and policy recommended the executive, who never dies." (Smith, 3d McLean, 121, A. D. 1842.)

p "The extradition was granted by the delivering state." (Spear, 550.)

q "The extradition of the subject is a dangerous power which cannot be too carefully watched, and ought not to be trusted alone to the executive." (Manchester, 5 Cal., 237, A. D. 1855.)

r "The governor acts not as a federal agent or officer, but in his official character as governor, and in so doing he represents not the sovereignty of the United

44 "The law of congress attaches this function to the gubernatorial office. It authorizes the governors of states and territories to cause the accused to be seized and secured, which is done by the issue of a warrant for his arrest (this is done) by holding him subject to the direction of the authority that ordered his arrest." (Spear, 424.)

45 "As to the instrument employed or authorized to carry into affect the article of the constitution (as he derives from it the authority to issue the warrant.) he must be regarded as acting by the authority of the United States." (Smith, 3d McLean, 121; Titus, 8 Ben., 411.; Leary, 10 Ben., 197; Doo Woon, 18 Fed. Rep., 898.; Spear, 502.

46 "How can these state officers execute a law of the United States? This question applies only to governors, since the other officers derive their authority from them, and are simply their agents. *Answer.*—Congress has seen fit to give them power, and the law is constitutional and valid." (Spear, 514.)

47 "There is a federal element consisting in the fact that the fugitive criminal is arrested and held under authority or color of authority of the United States." (Spear, 515.)

48 "They are governed by the law which *gives the power*, and by the rule which it prescribes." (Spear, 561.)

49 "His whole authority comes from the constitution and act of congress." (Cooley, 1879, Princeton *Review*, January, 165.)

50 "The only authority for extradition is the national constitution." (Rorer, interstate law, 225.)

51 "The constitution authorizes congress to legislate on the subject, and state governors get *their authority* to issue extratition warrants from the legislation of congress." (Spear, 563.)

52 "The opinions of courts in respect to his duties are entitled to the most respectful consideration; yet they relate to the duties of an officer of government, over whom in respect to these duties the authors of these opinions have absolutely no jurisdiction, they are simply *dicta*, and strictly speaking of no authority. The constitution and the law are authoritative; but the opinions of judges as to the duties of a state governor in a matter exclusively confided to him, are entitled to such consideration only as their eminent source suggests. If he adopts them he makes them his own by adoption. It is the executive judgment that is to rule the executive action in regard to a question that belongs exclusively to the executive office, there is no other judgment that can authoritatively rule that judgment." (Spear, 429.)

53 "Who shall decide it? Plainly the governor who is to perform the duty, and that too in the exercise of his own judgment upon the law and the facts. The demanding executive cannot decide it for him, and no court can decide it for him." (Spear, 430.)

54 "It is a new and positive right, independent of *comity*." (Prigg, 16 Peters, 614, A. D. 1842.)

55 "The framers of our constitution wisely made it no longer a matter of mere *comity* subject to the pleasure of each state but an absolute right and duty." (Romaine, 23 Cal., 582, A. D. 1863.)

States, but of the state of which he is governor and which acts through him. The action itself is that of a sovereign state." (Spear, 512.)

s "The concurrent action of two sovereign states is involved. The delivering state decides whether the case presented in the demand comes within the constitution and the law, and if it does, *it* makes the arrest and delivery." (Spear, 547.)

t "It should be administered with that *comity* which should prevail among kindred states." (Manchester, 5 Cal., 237, A. D. 1855.)

56 "It was not a matter of *comity* or public policy." (Spear, 429.)

57 "No interstate extradition power can ever be exercised on the ground of *comity*; it is regulated by *law*." (Rorer on interstate law, 225.)

58 "Extradition among the colonies and states has been regulated by *law*. Those who founded the colonies were extremely jealous of *comity*." (Re Morgan, 5 Crim. Law Mag., 701.)

59 "The constitution does not leave the question of extradition between the states to their discretion or to mere state *comity*." (Spear, 561.)

We have pointed out the deviation of the Robb decision from the ancient path. We have found the pilot and marked his errors on his own chart. The state agency, which he offers as an excuse for the exercise of state jurisdiction, we have proved (pages 43 to 54 *ante*) to be insufficient. He admits there is no other legal basis for its exercise. We have deferentially attempted (pages 54 to 66 *ante*) to bring to the notice of the court that the Robb decision undermines the foundation of the Booth and Tarble decisions. We have shown (pages 42–3, *ante*) that the pilot has done public penance for a public fault, and we have attempted to show (page 66 *et seq.*,) that the complications of the Winslow controversy are foreign to our domestic extradition law. This court, in the Holmes, Prigg, Ky. v. Denn, Booth, Tarble and Robb cases, has generously instructed the public by giving the reasons for its decisions. We have tried to draw our inspiration from the decisions of this court, and we confess that we are unable to conceal our anxiety when we see the Booth and Tarble cases undermined.

The great principles of law will remain, and to them our children's children will anchor their rights, their liberties and their possessions, for many generations yet to come. "The doctrine of concurrent jurisdiction having its basis in the complex character of an extradition case made up in part of a federal element and in part of state elements," is taught by the able author who wrote, in March, 1884, the article published in 29 Alb. Law Jour., 207. He finds one reason for the exercise of federal jurisdiction, and a different reason for the assertion of the state jurisdiction. This court, while it follows some of his reasoning, bases the right to exercise jurisdiction by the state judiciary on grounds not suggested in March, 1884, by the author to whom we refer.

He admits (page 509) "There can be no doubt that the governor of a state in issuing his warrant for the arrest and delivery of a fugitive criminal upon the demand of the governor of another state is acting under the authority or color of authority of the United States,

and consequently that the arrest and detention are under color of the same authority. An arrest for extradition is in this respect (page 510) essentially parallel to the (Booth and Tarble) cases cited by judge Sawyer."

He says, page 424, "the governor is authorized by congress to execute this power, without any state legislation bestowing it,"—"that (page 426) in his sphere, he is independent of the state courts; that (page 426) there is no power in the United States, or the state, to compel him to act; that (page 427) he is the sole depositary of the power; that (page 432) the duty is imperative; that (page 512) the governor is as independent of the United States as the czar of Russia; that (page 439) the actual arrest is made by a subordinate officer of the state, acting under *the authority of the governor*. That, (page 516) the moment we come to the execution of the law, we leave the federal sphere and pass into the sphere of the state governments. This fact furnishes a legal ground for the *habeas corpus* jurisdiction of state courts in such cases." "That (page 427) congress might have established a purely federal agency, and then (page 517) the jurisdiction would be exclusive in the federal courts."

If the doctrine of concurrent jurisdiction contained in Robb's case be correct, the jurisdiction would not be exclusive in such a case, and if the fugitive, being in custody of a purely federal agent, should apply to a state court for a writ of *habeas corpus*, the court would be bound, if it has concurrent jurisdiction, to give relief. So far as the form of the proceeding is concerned there is no distinction between the Booth, Tarble, Tom Tong, Cota and Robb cases. They were all of the same form. All *habeas corpus* cases.

We do not find that our learned author in 29 Alb. Law Jour., 207, bases his contention on the proposition that the federal and state courts have concurrent jurisdiction in *habeas corpus* cases, because they are civil actions. He takes a distinctly different position. He says, "the *habeas corpus* jurisdiction of the federal courts rests on one ground, and that of the state courts on another and equally valid ground." This court in Robb's case refused to endorse this proposition, and adopted one utterly inconsistent with it, viz., concurrent jurisdiction, not because the character is complex but because the proceeding is a civil action. In concurrent jurisdiction* the power which moves both courts is the same, the author-

* NOTE.—"Courts of different sovereignties cannot have concurrent jurisdiction of the same offense (or matter) unless it is one arising under some law common to them all." (U. S. v. Barnhard, 6 Crim. Law Mag., 204, A. D. 1884.)

ity is the same, the sovereignty is the same, just as in the case of naturalization under § 2,165, R. S. U. S., and other instances cited on page 6, *ante*. Our author involves himself in a *complex* proposition, saying "there is federal element consisting of the fact that the party is held under authority or color of authority of the United States. This fact brings the case within the *habeas corpus* jurisdiction of the federal courts, and the party is held by state agency and state officers, and this fact furnishes a legal ground for the *habeas corpus* jurisdiction of the state courts. There is no legal basis for it except this fact."

Lest we might be mistaken in our search for the error which produced the wreck we carefully examine our pilot's positions and find that he not only differs with himself, but that he also differs with this court, as we think we have already shown in the 14 Peters, (p 29, *ante*) and 24 Howard, (p. 79, *ante*) cases.

When anyone departs from legal truth, the further they go the greater the departure which they make, and new expressions become necessary to represent matters which were not meant by the ancient words. We find that our author evolves a *surrendering* state and *an asylum state*. We find no such expressions in the constitution and act of congress of our fathers.

There is one position taken by him which would justify the exercise of the jurisdiction which he advocates, viz., that the transaction in inter-state extradition is between two independent sovereign states. If this were so, the judicial power of the state could exercise its corrective force on the action of its officers, but we contend that except as to the demanding state, the sovereignty of all the other states is united by the national constitution, and that there can exist no will of a sovereign state in opposition to the national government in interstate state extradition or in any matter properly belonging to the cognizance of the nation.

Under the code of the ancient Hebrews, cities of refuge were a necessity. The severity of the common law was tempered by the invention of benefit of clergy. The fathers who made the constitution and the act of 1793 knew these things better than we do. They were not satisfied with the provisions of 1643, 1670 and 1777 in regard to the delivery of fugitives from justice, although these provisions were much more stringent and effective than any treaty made, or which ever will be made by the United States. They foresaw the invention of an asylum state as a shield for crime, and they guarded against it with sedulous care. They "*established*

justice" to exclude it. They did not leave the delivery with the state or to the state, because they knew that if they did the delivery might in some cases be refused. The fathers were content to trust to the civilization of the states not to pass barbarous or bloody laws, and as there would be no occasion for cities of refuge, they intended they should not exist. The lawyer who has not forgotten the constitution of our country, will not look for an asylum state within the United States. The asylums are extra-territorial.

We are justified in examining closely the reasoning of our author, because his review was put before this court in the submission of Robb's case. Every position which is founded on legal truth will bear the closest examination. It is only those which are erroneous which need the protection of a respectable author's name. This court rejected the complex view suggested by our author, and established the proposition that proceedings in a *habeas corpus* being civil actions, the state courts have concurrent jurisdiction with the federal courts under § 11 of the judiciary act, and § 1 of the act of March 3rd, 1875. Our author adopts this suggestion (page 518) in the second edition of his valuable work, published in November, 1884. However, he fails to purge himself of his former error, if error it was, or to reconcile his proposition "that the jurisdiction of the federal courts rests on one ground, and that of the state courts on another and equally valid ground," with the suggestion that it rests upon the same ground and "is concurrent."*

The Robb decision was rendered May 5th, 1884. The book we quote from dates November, 1884. We quote from page 519: "The case of Robb subsequently to the preparation of the above argument was considered by the supreme court of the United States." There may easily be a difference between the time of preparation and publication of an argument but if the idea that because a *habeas corpus* is a civil action—and under § 11 of the judiciary act and § 1 of the act of March 3, 1875, and the Tom Tong, 108 U. S. R., 556, and Cota 110, U. S. R., 385, cases—the state courts have concurrent jurisdiction had dawned on the mind of our author in March, 1884, it was strange that he did not refer to this ground of jurisdiction, in 29 Alb. Law Jour., 207. If it came to him after that time it was strange that he did not abandon, or explain his "*complex*" view. It must be remembered that he says in March, 1884, that "there is no legal basis for it except this fact." And he repeats the assertion six months after this court has decided that this is

* NOTE—U. S. v. Barnhart, 6 Crim. Law Mag., 204, p. 85, *ante*.

not the reason for the jurisdiction and that there is another and entirely different reason.

If the complex view is correct the concurrent view must be incorrect, and vice versa. Our author is not in a position to abandon the complex view without abandoning the sovereignty of the *asylum* or surrendering state. He has with remarkable boldness committed himself to these questionable positions. See §§ *c, d, e, f, g, i, j, k, l, m, n, o, p, r* and *s*, pp. 79, 80 and 81, *ante*. We think the decisions and his own writings are against him, and that there is no asylum, surrendering, or delivering *state*. We submit the delivery is by an agent of the federal government, acting under the constitution and laws of the United States. In support of our view, we refer to the the 59 extracts given on pages 79 to 83, *ante*. We quote (1) "The duty of the governor is ministerial, without the right to exercise executive or judicial discretion. It (2) is a national assurance. The (3) rule is imperative, no discretion remained with the executive. (9, 10, 11.) It (15) is an absolute, positive right and duty. To (21) refuse would be an open, palpable violation of the constitution. An (24) absolute right and duty. No discretion is invested in the governor, it is his imperative duty, the (27) duty is imperative, the (28) function is exclusively committed to the governor. He is a man of (29) common sense, authorized (30) independent (31) and not subject (32) to compulsion. The power is (43, 44) from congress, under (45 to 51 inc.) the authority of United States. The opinions of courts are merely advice. He is the exclusive judge and (52, 53) subject to no judge and no court."

"No (3) state can refuse to surrender. The power (4, 5, 6,) cannot be possessed by the states. The (7) constitution cuts off the power of the states and (8) provided for the exercise of the power contrary to the will of a state. The (12) subject is completely taken from the states, uncontroled and (15) uncontrolable by state sovereignty, withdrawn (17) from the jurisdiction of the state. The (17 to 24) power of the United States is exclusive. No state (25) can interfere, confided to another sovereign and (39) the sovereignty of the state restricted." Now if this duty is thus cast on "the governor, without discretion and imperatively, and he is independent of any power of the United States, or of the state, (31–32) and other states have nothing to do with it and the general government (*l.* p. 80) nothing to do with it," (!! *Que.* ?) how can it be said that this kind of a transaction is the "intercourse of separate and independent sovereigns?" History is replete with instances of the intercourse of

sovereigns, but from the reign of the queen of Sheba to the present time we know of no example which would illustrate this kind of sovereign intercourse.

We think the following problem demonstrates our view to be correct:

The demand is by a governor of a state. Let x represent each state —there are 38 states—therefore, we have $38x$.

The responding power is the governor of the state. The governor acts by authority of congress. Congress derives its power, not from the states, but from the people of *all* the states; hence, the responding power equals $38x$. The responding power being by virtue of all the states, we have, x the demanding state, versus $38x$ as above.

Or, in other words:

Let x = each state.
Let y = the entire federal government.
Now, $38x$ must = y.

The demanding state = x as every state = x. Now, x makes a demand upon what? Upon y. Now, $y = 38x$; hence, x demands against $38x$.

Another gentleman states the proposition as follows:

The demand is by a governor of a state, Let a represent each state. —there are 38 states—therefore we have $38a$.

The responding power is the governor of the state. The governor acts by authority of congress. Congress derives its power, not from the states, but from the people of *all* the states; hence, the responding power is never less than $38a$, *i. e.* the power of congress.

We quote again from Spear, (516) "state officers exercise authority in the arrest and detention of fugitive criminals, this fact furnishes a legal basis for the *habeas corpus* jurisdiction of the state courts, there is no other legal basis for it." Where is the slightest hint of concurrent jurisdiction, under § 11 of the judiciary act in this proposition? But what kind of authority do they exercise? Mr. Spear answers (p. 439) they act under the authority of the governor. The governors (p. 424–563) are authorized by congress. The other officers (p. 514) derive their power from the governors *and are simply their agents*. We think this would not be so if the delivery was by a sovereign state. In such case the officers would be agents of the state and subject to its *habeas corpus* power. But it is because the governor acts under the authority of congress and not under the sovereignty of the state (as Mr. Spear says rightly) that the officers act under authority of the governor. Now if the governor is exercising federal power, as cannot be doubted and (as Mr. Spear says, p. 514) "congress has seen fit to give them the power, and the law is constitutional and valid," it follows that, looking to the character

of the act and not to the character of the agent (11 Mich., 307; 100 U. S. R., 346; p. 5, *ante*) these agents are (as Mr. Spear says truly) simply agents of the governor in executing the federal laws. This argument does not disclose any ground of state jurisdiction.

The governor is not bound to use a state officer, he might issue his warrant to a federal marshal, or to a private person. Would the state court have *habeas corpus* jurisdiction on Mr. Spear's hypothesis if state officers were not used? If "this fact" which in his opinion gives jurisdiction is wanting, then manifestly they would not have jurisdiction in the cases we are discussing if he is correct. But this court assigned a different reason, namely concurrent jurisdiction, because the proceeding is a civil action, and Mr. Spear incorporates this suggestion in his book, (p. 518) but curiously enough fails to explain or modify the reasons invented by himself which are contrary to it. It is manifest that if the jurisdiction is concurrent on account of the form of the proceeding, the writ would run to any state officer, United States marshal or private person and the ingenious argument of our friend would be useless and superfluous; and if "the simple truth" is that the state courts have concurrent * jurisdiction to issue the federal writ, the acute and laborious argument about the complex nature of interstate extradition would be vain and void and inapplicable.

We quote from an authority which has stood unshaken for forty years.

"When the patriots and wise men who framed our constitution were in anxious deliberation to form a perfect union, among the states of the confederacy, two great sources of discord presented themselves to their consideration; the commerce between the states and *fugitives from justice* and labor. The border collisions in other countries had been seen to be a fruitful *source of war and bloodshed*, and most wisely did the constitution confer upon the national government the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uniform rule and establish uniform laws among all the states in those cases." (Smith, 3d McLean, 127, A. D. 1842.)

"The subject (p. 80, § 12, *ante.*) is completely taken from the states. The power (p. 79, §§ 4, 5, 6) cannot be possessed by the states. The subject is (p. 80, §§ 15 to 22 inc.) withdrawn from the jurisdiction of the state and the jurisdiction of the national government is exclusive. It is controled by one (§ 23) and the same will throughout the whole union, and the power of the United States

*NOTE.—U. S. v. Barnhard, p. 85, ante.

is exclusive, and operative in every (§ 24) state and upon every state. The execution of the laws of the United States (p. 81, § 39, *ante.*) and the judicial determination of questions arising under them are confided to another sovereign and to that extent the sovereignty of the state is restricted, (because) the state court (§41) may administer state and federal law in such a manner as to paralyze the federal government. The power which the one possesses the other does not. They are established for different purposes and have separate jurisdictions." (92 U. S. R., 550, p. 13, *ante.*) If this chain of reasoning is unbroken it follows that the state courts have *not* a valid basis for *habeas corpus* jurisdiction in the fact that "state officers exercise authority in the arrest (Spear, 516) and detention of fugitive criminals."

Our learned reviewer (Spear 517–518,) attempts to work out a conflict of opinion between *the attorney general* of Illinois, (3d McLean, 121,) A. D. 1842, and judge Sawyer (9 Saw., 568), A. D. 1884. We remark there is no conflict between judge Pope, in *re*, Smith 3d McLean, 121, A. D. 1842, and judge Sawyer in *re* Robb, 9 Saw., 568, A. D. 1884. It should be remembered that *re* Clark, 9 Wend., 218, A. D. 1832, and *re* Smith, 3d McLean, 121, A. D. 1842, are the leading cases which come to us as precedents showing the exercise of jurisdiction by the state and federal courts. Clark's case does not refer to any precedent, for the exercise of jurisdiction by the state courts. Smith's case refers to 16 Peters, 614.

In Smith's case the attorney general of Illinois made a perfunctory plea which was overruled, as it should have been, by the circuit court. Of what value as an authority is the plea of a lawyer which was overruled more than 40 years ago, and against which there is a continuous and unbroken line of authorities?

If the opinion of the circuit court in 1884, had conflicted with the opinion of the circuit court in 1842, there would be some excuse for an argument drawn from such a conflict. But there is no conflict between the Smith and Robb cases, both opinions perfectly agree.

Suppose it be true that "the opinion of judge Sawyer is equally contradicted by the uniform practice of the state courts," does this prove judge Sawyer wrong and the state courts right?

Prior to the Tarble decision it may have been the uniform practice of the state courts, "to pass over the line of division between the two sovereignties," (Booth and Tarble) but this "uniform practice" did not make it lawful. If the state courts had not been trenching

on the jurisdiction of the federal judiciary, there would have been no opportunity or occasion for the Booth and Tarble decisions. That the state courts have thus trenched, is patent and indisputable. This brief (page 3) opens by presenting this fact. The supreme court of Massachusetts, (A. D. 1851) in the great Sims case, (7 Cush., 285, cited on pp. 13, 70, *ante*,) does not disclaim the power "to release a prisoner held under process from a court of the United States, or a soldier or a sailor held by a federal officer." This "uniform practice" was more bold and defiant before the culmination of the Booth and Tarble cases than it has been since. There may be some excuse for ignorance, and Mr. Spear says, (page 189,) "the law of extradition was very little known in 1854 in the United States."

But was this practice uniform, as stated by our author? We think not. The case of Willard and wife, A. D. 1814, Serg. const. law, pp. 395–6; the line of 24 cases cited on page 4, *ante*, running from 1807 to 1872; Buzine & Schlemn, A. D. 1846, 4 Harr., 572–7; *re* Fetter, A. D. 1852, 3d Zab., 311; the *habeas corpus* laws of Arkansas (§ 3,130, R. S.); Delaware (§§ 697, 769, revised code 1874); Illinois (§ 21, R. S., 1845, page 272, § 8); Mississippi (§ 2,520, revised code); and Pennsylvania (page 756, digest); Johnson v. Riley, A. D. 1853, 13 Ga., 133; and other cases strongly tend to show that the practice was not uniform, and its propriety was doubted by respectable authority.

Mr. Spear says (p. 519): "If the *habeas corpus* power (of state courts), as granted and defined by state laws, embraces such cases, then no reason exists in the federal cognizance of the same cases why the (state) power may not be exercised." If this proposition is correct, the legislature of any state may grant power to its judiciary to discharge any federal prisoner, held by a federal judgment or otherwise within the state. This power, if it really exists, is no respector of persons, and there is no "officer of the general government, acting under its laws," who may not be compelled to obey the power of the state in which he is found. We say the proposition is incorrect. We refer to the 59 numerical extracts on pp. 79-83 *ante*, but particularly to the following: "The constitution (24) creates an absolute right, and imposes an absolute duty, operative in every state and upon every state. (Spear, 293.) No (25) state can interfere. (Spear, 330.) No (26) discretion is invested in the governor. (Spear, 433.) The (27) duty is imperative, exclusively (28) committed to the governor. (Spear, 433-441.) He (33) is the sole

depositary of the power. (Spear, 427.) Not (32) subject to compulsion. (Spear, 426.) Taken (39) from the state by the (45) authority of the United States. The (52-3) judgment belongs exclusively to the executive, no other judgment can rule that judgment, no court can decide it for him." (Spear, 429-430.)

We think that our learned author greatly errs in his "complex" view, and that doubts and difficulties disappear when we return to the "simple truth" as found in the constitution, and the law of February 12, 1793. Inter state extradition is not a transaction between two sovereign states. "It is a national assurance affecting the peace and welfare of the whole Union, and extending with an equal and supreme force to every section of our country." The power which moves and supports this great national obligation is national power, and it follows under the reasoning of the Booth and Tarble cases that a person so held must look to the federal tribunals for relief.

The case of Willard and wife (p. 92, *ante*) shows how clearly this matter was understood in 1814, when judge Ray held that "by the operation of the constitution and laws of the United States," a person arrested under the act of February 12, 1793, as a fugitive from justice, is excepted from the state remedy of *habeas corpus*. If the sovereignty of the United States is supreme, this must be true, and, on the contrary, if the sovereignty of the United States is dormant, and the sovereignty of *the surrendering state* in motion, it must be incorrect.

In 1832 (9 Wend., 218) we find the supreme court of New York offering a reason for the exercise of this jurisdiction. The time was nearly 40 years after the passage of the act of congress of 1793, and 20 years after Willard's case. If there was a well established practice supported by respectable authority, would the court have rested on the foundation that "the prisoner is entitled to the benefit of the *habeas corpus* laws of New York, so far as they are applicable"? If the proceeding was "complex," as suggested by our author, why did not the court say so?

If the jurisdiction was concurrent with the federal courts, as we are taught in Robb's case, why did not the court refer to this source of power? The prisoner, John L. Clark, was not in the custody of the state of New York, nor in violation of the sovereignty of New York. He was in custody under the extradition mandate of the governor issued under the authority of the United States. We deferentially submit that J. L. Clark, being in the custody of the state of New York, was:

(*a*) Legally held under the authority of the United States; or,
(*b*) Illegally held under color of such authority; or,
(*c*) Legally held under authority of the state of New York; or,
(*d*) Illegally held under color of such authority.

We reason that in the cases *a* and *b*, the jurisdiction under § 14 of the judiciary act, and *re* Bollman, 4 Cranch, 95, A. D. 1807, was exclusively in the federal judiciary, and in the cases *c* and *d* the jurisdiction was exclusively in the state judiciary. It is evident that the state court in Clark's case doubted its jurisdiction, because it felt compelled to give a reason for its exercise. Probably the court remembered Bollman's case, 1807, and Willard's case, 1814. With doubt and hesitation the court takes jurisdiction on a ground which would be perfectly good if the transaction was between independent and sovereign states, but not good if inter-state extradition is as we claim, "a national assurance pervading the whole Union with an equal and supreme force, and independent of state sovereignty."

Looking to the nature of the writ of *habeas corpus*, we find the sovereign is entitled (3 Blackstone, p. 131), at all times to know why the prisoner is held, and as an incident to this right of the sovereign, the prisoner gains his liberty if no good cause for his detention is shown. From the nature of this enquiry, it is evident that it must be made by the sovereign whose power is in action. What right has a state court, by virtue of the sovereignty of the state, to ask (page 3, *ante*) genl. Morgan Lewis, 1813; marshal Ableman, 1854; lieut. Stone, 1869, or genl. Neill, 1871, why they held Stacy, Booth, Tarble or Casey? The attempt to do so arises from a misconception of the law, as we think we have shown by the cases cited on page 59, *ante*. The sovereignty of the United States acting by its agents of any rank or grade, or sex or color, "is not to be questioned by any person or power" (100 U. S. R., 262–6; Ib., 396; pp. 20, 32–3, *ante*) except its own tribunals.

We have seen, however, (pp. 6–40, *ante*) that the state judiciary are for certain purposes a part of the judicial force of the United States. We have deferentially suggested (page 54 to 66, *ante*) that if the state courts have concurrent jurisdiction to issue the federal writ of *habeas corpus*, then the supreme court of Wisconsin had jurisdiction to issue the federal writ as an original process in the Booth and Tarble cases.

But if the supreme court of Wisconsin had jurisdiction under § 11 of the judiciary act of congress of 1789 (111 U. S. R., 625) to issue and hear the federal writ of *habeas corpus*, it did not exercise

it in the Booth and Tarble cases. In both of these cases the action of the supreme court of Wisconsin was in the exercise of its appellate jurisdiction. We would ask where the supreme court of a state finds its authority for revising, reversing or affirming the judgment of a federal court?

But if the state judiciary have concurrent jurisdiction to issue the federal writ, they become, for this purpose, a part of the federal judiciary, and having issued and heard the federal writ, they are, or ought to be, subject to the appellate jurisdiction of the circuit courts of the United States as provided in chapter xiii., R. S. U. S. No state constitution or legislature could invest the supreme court of the state of Wisconsin with power to correct or affirm the action of the commissioner of Dane county on a federal writ of *habeas corpus*, yet this is what was done in the Tarble case.

In Tarble's case, the supreme court of Wisconsin examined and affirmed the judgment of the commissioner of Dane county releasing Tarble from the custody of lieutenant Stone. In Mohr's case (2 Ala. L. J., 457, A. D. 1884), the supreme court of Alabama, *by a divided court, Brickell, chief justice, dissenting*, affirmed the judgment of the probate court releasing Mohr from the custody of Gentner.

If the state courts have concurrent jurisdiction under § 11 of the judiciary act to issue and hear the federal writ, it would follow that the commissioner of Dane county truly had jurisdiction in Tarble's case, and the probate court a like jurisdiction in Mohr's case, but neither of these cases disclose the source of the authority of the supreme courts of Wisconsin or Alabama to review the judgment of the commissioner of Dane county in Tarble's case, or the probate court in Mohr's; these cases being both cases arising within the sphere of federal power—that is to say, within the sovereignty of the United States. "The judicial power of the United States shall extend to all cases in law or equity arising under the laws of the United States," etc. (Const., art. iii, § 2.) "This power shall be vested in such courts as congress shall ordain and establish." (Const., art. iii, § 1.) Can it be denied that the Booth, Tarble and Mohr cases arose under the constitution and laws of the United States? If these cases were federal cases, as we think they were, they belonged to the federal judiciary, and if, under the Robb decision, the state courts are a part of the federal judiciary, and acted as such in disposing of these cases, we are forced to conclude that the primary proceedings in these cases were truly authorized by federal law, because if the primary proceedings took place before

courts or judges authorized by federal laws to hear and decide these matters, then these courts and judges were, for the purpose of these cases, a part of the federal judiciary. This makes it all the more difficult to discover where the supreme courts of Wisconsin and Alabama found their power to review, by appeal or otherwise, the action of the commissioner of Dane county or the probate court, when these courts or judges were exercising federal power and executing federal laws. No court has jurisdiction outside of the sovereignty to which it belongs. (See quotation from Booth's case on p. 63 *ante*.) How can it be said that the supreme courts of Wisconsin or Alabama had any judicial power to exercise appellate jurisdiction in the Booth, Tarble and Mohr cases?

We have been unable to find any instance in which the state courts issued the federal writ and we are brought to the "strange anomaly and forced construction" (16 Peters, 614) of a state by virtue of her sovereignty interrogating the United States why she exercises her sovereign power. This would not be so if the state court issued the federal writ, because then the sovereignty of the United States would be acting by the state court which, in this case, would be exercising federal power, and for the occasion would be a part of the federal judiciary. In the case at bar and in Robb's case, the state court, by virtue of the sovereignty of the state, issued the state writ of *habeas corpus*, as clearly appears from the transcripts.

As contrary to the positions of the author which we have examined, we deferentially submit that the Booth and Tarble cases contain the correct instruction on the subject. We have two governments, federal and state, each supreme in its own sphere, and neither can invade the dominion of the other. (Booth and Tarble.) Each government has powers and duties, and they are separate. (92 U. S. R., 550.) Each has its writ of *habeas corpus*. The assumption by the state judiciary of power *derived from the state* to discharge persons held under authority, or color of authority, of the federal government, by whomsoever the persons may be held, whether court commissioners, United States marshals, state officers or private persons, we think is revolutionary and destructive of our form of government. It is certain that § 14 of the judiciary act of 1789 vested the *habeas corpus* power of the United States in the federal judiciary.

We do not find that the doctrine of concurrent jurisdiction, as stated in Robb's case, contained in the following decision:

"Acting under the immediate influence of this injunction they must have felt with peculiar force the obligation of providing efficient means by which this great constitutional privilege should receive life and activity, for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts of the United States the power of awarding writs of *habeas corpus.*" (Re Bollman, 4 Cranch, 95, A. D. 1807.)

"Whatever motives might induce the legislature to withhold from the supreme court the power to award the great writ of *habeas corpus* there could be none which would induce them to withhold it from every court (in the United States), and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be that the first sentence vests this power in all the courts of the United States, but as those courts are not always in session the second sentence vests it in every justice or judge of the United States." (4 Cranch., 96.)

"The state courts are not inferior courts except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed and is not by *habeas corpus.*" Re Bollman, 4 Cranch., 97, A. D. 1807:

We respectfully submit that *Re* Bollman, 4 Cranch, 95, A. D. 1807, is inconsistent with the existence of concurrent jurisdiction in the state courts in the exercise of the federal writ of *habeas corpus.* The reasoning of this case negatives the existence of such jurisdiction. The court say that "if the means be not in existence, the privilege of the (of the writ) would be lost." Now, this would not be true if the state courts had concurrent jurisdiction, because in such case the privilege would not be lost; the state courts could grant and hear the the writ. How could it be lost in such a case? "It is granted to all in the same sentence and by the same words." To what courts is it granted by § 14 of the judiciary act? This section does not refer to the state courts, and the federal courts being specified, it would be reasonable to say that the state courts are excluded. Again, in the same decision we read, "the mode of proceeding is not by *habeas corpus.*" Cotemporaneous construction has always been regarded of great value, and if § 11 of the judiciary act of 1789 had conferred jurisdiction on the state courts, would the supreme court of the United States have failed to notice it when construing the act only eighteen years after its passage?

We are aided in our study of this subject by the consideration that neither government can suspend the writ of the other. Suppose the state should suspend her own writ, that suspension would not suspend the writ of the federal courts. But, if the state judges or courts may under the laws of congress issue and hear the federal writ, it is manifest that the suspension of the state writ would not suspend the federal writ issued by the state judiciary. Conversely—* suppose the state writ is not suspended, but congress suspends the federal writ. It appears plain that under such suspension the federal courts would not give relief on *habeas corpus*. The state writ is in full force, and so long as the limitations between the two governments are observed, no harm can come from its use. Of course, in such a situation, all applicants for the federal writ would be driven from the federal to the state courts, and if the state courts have power derived either from the sovereignty of the United States or the state, "to inquire into the grounds upon which any person is restrained of his liberty and to discharge him, if it be ascertained that such restraint is illegal; notwithstanding such illegality may arise from a violation of the constitution or the laws of the United States," (111 U. S. R., 625)—it would be possible, it would be easy, for the state judiciary by legal means, to place the state in opposition to the union, or outside the union as might suit the policy of the state or gratify the changing temper of the times. The liberation or confinement of one man may be a rather small affair, but the right of the state judiciary to nullify an act of congress, or declare it to be unconstitutional is not a small affair, but on the contrary, a very large and important question, and one on which questions of peace or civil war, perpetuation or dissolution of our government, national strength or national ruin, may depend, and when we consider the perils and dangers which have beset our national life, and at times jeopardized our national existence, we breathe with bated breath lest at some time when passion rules the hour some enemy of our government, inspired by mischief, should use this powerful wedge, and with it split our precious and consecrated constitution.

*(See by Manning, j. p., 10 *ante*.)

NOTE.—Since the foregoing was printed the following has reached us: "The (interstate) extradition of criminals is governed exclusively by the constitution and laws of the United States. No state can deal with other states," etc. Malcomson v. Scott, supreme court Mich., A. D. 1885, 6 crim. law mag., 594.

At present there may be no motive for such an act, but our history, short as it is, has seen the strongest motives operating to rend the states from the union. Would it not be wise and well in this time of profound peace to settle this great question, in such a manner as to preclude all future doubt as to the powers and duties of the federal and state governments.

To this great end we have contributed these efforts in the fullest confidence that the questions which we have presented are worthy of the careful consideration of the court.

WE CONCLUDE:

1st. That if the jurisdiction of the state courts is concurrent with the federal courts in *habeas corpus* cases the order of the circuit court (*vide* transcript, Moffitt v. Kurtz, 871) remanding our case to the state court must be reversed and the proceedings in the superior court (*vide* transcript Kurtz v. Moffitt, 860) set aside for want of jurisdiction and the case be remanded to the circuit court for further proceedings.

2d. That if the jurisdiction of the state courts is not concurrent with the federal courts in *habeas corpus* cases, the state court had no power to issue or hear the writ of *habeas corpus* in this case.

3d. The judgment of the superior court (although rendered as we believe, without jurisdiction) is correct.

WE RESPECTFULLY SUBMIT:

(1.) That the order remanding the case in Moffitt v. Kurtz, No. 871, be reversed and the cause remanded to the circuit court for further proceedings; and,

(2.) That the case of Kurtz v. Moffitt, No. 860, be remanded to the superior court with instructions to dismiss the case for want of jurisdiction apparent on the face of the pleadings; or,

(3.) That the judgment of the superior court be affirmed; or,

(4.) That we may have such other, or further, or different relief as to this court may seem meet or this case may require.

Respectfully submitted,

ALFRED CLARKE,
S. W. SANDERSON,
counsel for plaintiffs in Moffitt v. Kurtz, No. 871, and
counsel for defendants in Kurtz v. Moffitt, No. 860.

Due service of the above brief is hereby admitted this 25th day of August, 1885.

H. G. SIEBERST,
R. M. SWAIN,
counsel for defendants in Moffitt v. Kurtz, No. 871, and counsel for plaintiffs in Kurtz v. Moffitt, No. 860.

Stipulated: The above entitled causes, numbers 871 and 860, are hereby submitted for decision on briefs on file.

ALFRED CLARKE,
S. W. SANDERSON,
counsel for plaintiffs in Moffitt v. Kurtz, No. 871, and counsel for defendants in Kurtz v. Moffitt, No. 860.

H. G. SIEBERST,
R. M. SWAIN,
counsel for defendants in Moffitt v. Kurtz, No. 871, and counsel for plaintiffs in Kurtz v. Moffitt, No. 860.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 860.

S. KURTZ, PLAINTIFF IN ERROR,

vs.

J. W. MOFFITT and T. W. FIELDS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

IN THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

Department No. 1.

In re STEPHEN NOLL. } On Habeas Corpus. (May 8, 1885.)

R. M. SWAIN for Petitioner.
ALFRED CLARKE for Respondents.

WILSON, J.—This is an application by the petitioner, Stephen Noll, arrested under the name of Stephen Kurtz, for his discharge from the custody of respondents, J. W. Moffitt and T. W. Fields, on the ground that he is illegally restrained of his liberty by them. That such illegality consists in the fact that they have arrested and now detain him in custody as a deserter from the United States army. That at the time of making such arrest they were neither United States officers, nor had they any warrant or other authority for making the same.

Upon the filing of the petition a writ was issued and served upon respondents, who produced the petitioner in court, filed their appearance, together with a petition, in due form, asking for the removal of the application to the United States circuit court for the ninth circuit, district of California, on the grounds:

First.—That the petitioner, Stephen Noll, was a citizen of the state of Pennsylvania, and that each of the respondents were citizens of the state of California.

Second.—That the question involved was one arising exclusively under the constitution and laws of the United States, to wit, to determine whether a person, who is not an officer of the United States, has power or authority to arrest a deserter from the army thereof, without having first obtained a special warrant therefor from a proper officer.

Upon the hearing of this application, R. M. Swain, Esq., appeared as counsel for the petitioner, Stephen Noll, and Alfred Clarke, Esq., as counsel for the respondents.

The cause was fully argued, and among the authorities cited were: In re Tom Tong, 108 U. S. R. 556; in re Cota, 110 id. 385; Robb *vs.* Connolly, 111 id. 637; also 1. Crim. Law Mag. 143 to 169. The cause was submitted, and, after due deliberation, the application was granted, and the cause removed to the United States circuit court for further proceedings.

Thereafter the application of the petitioner, Stephen Noll, for his discharge came on regularly to be heard, April 21st, in said circuit court, before the Honorable Lorenzo Sawyer, judge thereof, and the Honorable Ogden Hoffman, United States district judge, whereupon, objection was taken to the jurisdiction of that court, which, after argument and examination, was sustained by said judges, and the cause remanded to this court for further consideration.

Such being the status of the cause, and in view of the great importance of the principle involved, the Honorables D. J. Murphy, and D. J. Toohy were invited to, and did, sit with the judge of this department, and participated in the further proceedings herein.

The application coming on the second time before the above-named judges, the parties appearing by their respective counsel, it was argued and submitted for decision upon the pleadings and admission in open court, from which it appears that the applicant, Stephen Noll, enlisted in the army of the United States at Cleveland, Ohio, on the 29th day of May, 1876, and deserted therefrom at Fort Vancouver, Washington Territory, on the 17th day of March, 1879, he being at that time a private in company D, of the 21st Regiment Infantry. That after his desertion he assumed the name of Kurtz, which he retained up to and at the time of his arrest. That on the 8th day of April, 1885, he was arrested at the city and county of San Francisco, by the respondents, who were, and still are, police officers of said city and county. That such arrest was made without a special warrant. That at the time of the service of the writ of habeas corpus upon the respondents, they were on their way with petitioner to the

Presidio, the nearest military post, to the point where said arrest was made, for the purpose of delivering petitioner to the proper military authorities thereat.

It is insisted on the part of the petitioner that his arrest was illegal, because:

First.—His desertion was barred by the statute of limitation, prescribed by article 103, of section 1342, of the Revised Statutes of the United States, and by section 800, of the penal code of the state of California.

Second.—That the respondents being simply police officers of the city and county of San Francisco, and not officers of the United States, had no power or authority to arrest petitioner without first obtaining a special warrant therefor.

Third.—That the respondents were prohibited by rule, regularly adopted by the police commissioners of the city and county of San Francisco, from arresting a deserter from the United States army without first having obtained a special warrant therefor, and as this arrest was made without obtaining such warrant it was illegal, and the petitioner is entitled to his discharge.

Fourth.—That desertion from the United States army is not cognizable in any manner by the civil officers of the state of California, as such, and therefore the respondents, as such officers, were not empowered to make the arrest.

The question we are considering is one of vast importance, irrespective of the rights of the petitioner. If the respondents had the right to make the arrest, they had the right to use sufficient force to effect that object. The result of which might have been either the death of petitioner or of one or more of the respondents. In other words, cases of a like character are arising in different localities frequently. Some have resulted, and others may result, in homicide. Therefore it is a question which requires a most careful and deliberate consideration.

It must be conceded that every person unlawfully deprived of his liberty has the right to use the judicial power to demand and enforce his deliverance. Under our peculiar form of government the first question that naturally arises in such cases is, whether the cause has arisen under the federal or state constitutions and laws; whether it is cognizable in the federal or state courts.

In this case I was of the opinion that the question properly arose under the federal constitution and laws, and therefore properly belonged to the federal judiciary.

The judges of the federal court however, entertaining a different view, and refusing to entertain jurisdiction of it, I am com-

pelled to examine it or the petitioner will be virtually prohibited from having his supposed grievance investigated by any judicial tribunal.

In the consideration of this question it becomes necessary to briefly refer to the powers of the state and federal government.

The federal government may be said to be one of derived or granted powers; that is to say, it possesses those powers which the states surrendered to the federal government. All powers not specially delegated are retained in the states themselves.

While the powers delegated to the federal government are limited in number they are not limited in the quantity of the power granted. For instance, the powers to raise and support armies, declare war, or make treaties, are vested in the national government as fully to all intents and purposes as though they had never been possessed by the states or any other power. Tenn. *vs.* Davis, 100 U. S. R. 257; in re Seibold, Id. 372; in Virginia, Id. 348; in re Yarbrough, 110 U. S. R. 662.

These powers are therefore surrendered by the states as fully as though they were never possessed, and the national government is as fully possessed of these powers as any government can be possessed of any power.

The right to raise and support armies directly involves the right to preserve them, and invests the federal government not only with the power to raise or enlist men, but to take such measures as may be proper to restrain a soldier from deserting when he has once enlisted, during the time he has contracted to serve. Any other rule would be to confer upon the federal government a shadow without a substance. It would have the power to raise and support armies, but would not have the power to prevent its armies from melting away at any time, even when most required. It must be conceded then that the right to raise and support armies necessarily carries with it the right to protect the men comprising the same, either by prohibiting their deserting or in any other manner it may deem advisable. Conceding then that the federal government has the right to make such laws, rules or regulations, in regard to the desertion of soldiers from the army, as it may deem advisable, it has the power to authorize any one, whether he be an officer of the United States or of a state, or even a private individual, to make such arrest and prescribe the terms, conditions and limitations, under and upon which such power should be exercised. It might be questioned whether the federal government would have the power to compel a state officer to take such action, but that question is not involved in this application nor necessary to be decided, for the reason that

the respondents arrested the petitioner of their own volition and not under any compulsion.

The only question in this regard necessary to be considered is whether the federal government has given permission to the respondents, either as state officers or private individuals, to make this arrest.

It was held in ex parte Yarbrough 110 U. S. R. 658, that that which is implied is as operative and effective as that which is expressed in a written instrument. We are satisfied that the power is clearly implied, and therefore that it has been clearly given.

1st. The contention of petitioner that the statute of limitation entitles him to release we decide against the petitioner on the authority of re White, 9 Saw. 49, which we consider is supported by re Reed, 100 U. S. R. 13 and re Crouch, 112 U. S. R. 179.

2d. We take notice that the constitution of California, 1879 (art. 1, sec. 3), expressly declares that "the constitution of the United States is the supreme law," etc. This constitution is mandatory and prohibitory in all its provisions, and adopting and incorporating as it does the constitution of the United States, we are justified in giving to the federal constitution the same force and efficiency which belongs to the state constitution.

When a man (capable of contracting) enlists he resigns the great safeguards of liberty which the constitution secures to all not members of the military and naval arms of the government, and submits himself temporarily to military law and military discipline. This sacrifice is not without its advantages and compensation.

The soldier receives his pay, rations, land warrant, citizenship (if he be not a citizen by birth), pension, and other advantages, besides the satisfaction of having discharged a patriotic duty.

The constitution of California, art. 20, sec. 3, prescribes the oath of office for all officers of the state. They must swear to "support the constitution of the United States." The charter of San Francisco (passed April 19th, 1856) provides (sec. 24) that "police officers must be citizens of the United States." These police officers, not less than other persons, enjoy the benefits of the protection of the national government, and not less than other persons they are bound to give it their allegiance and support. If a recruit enlists the national government is strengthened (sec. 1120, R. S. U. S.) If a soldier deserts the national government is weakened. (Drum on Desertion, Scott's Military Laws of the U. S.) This is not a matter of indifference to the people of the United States, because all who owe allegiance to the federal government, and among them are the respondents, are bound to *support* the federal government. This being so, the

municipal policeman cannot avoid taking notice of the supreme law of the land, because the enforcement and execution of this law is not and cannot be a breach of the peace of the state. Re Seibold, 100 U. S. 372.

While on the other hand the resistance which may be offered to the execution of the laws of the United States may be a crime against the United States and a breach of the peace of the state as well. (6 Cr. Law Mag. 201-7.) We therefore hold that as the petitioner was not entitled to his freedom the respondents lost none of their rights as citizens of the United States by joining the police force, and the laws of the United States were sufficient authority to justify the arrest of petitioner by respondents.

3d. Petitioner contends that under the rule of the police department the respondents were prohibited from arresting petitioner, therefore the petitioner is entitled to be discharged.

In Tape *vs.* Hurley, 5 W. C. R. 692, it appeared that the board of education had adopted a rule that any teacher who admitted a Chinese pupil to a public school would be dismissed from the department. It further appeared that Chinese children were entitled to the privileges of the public schools. The court would not suppose that the board of education would adhere to and enforce a rule after they knew that the rule was illegal.

We dispose of this rule in the same manner. It does not entitle petitioner to his discharge, and the rule will disappear as soon as this decision shall reach the authorities who control the police department.

4th. It is true that desertion from the army is not cognizable by the judicial power of the state of California.

But the reason is because the state has confided to the national government the administration of this branch of the law. The power is not extinguished. On the contrary it is preserved and magnified, and although the federal government is the recipient and depository of the power, it is also true that the relations of the respondents to the federal government are such as fully justify this arrest, and it is not necessary for us to say that the respondents could be compelled to make the arrest without a special warrant, but we do say that the arrest having been made the petitioner cannot be relieved by us. The power which holds the petitioner is federal power, he is not in the custody of the state, or in violation of the sovereignty of the state. The court martial to which he is amenable will give him all the relief to which is entitled. To interfere with its action would be a trespass on the domain of federal power, which we are neither authorized or disposed to commit.

WE HOLD:

1*st*. That desertion is a crime.

2*d*. That the plea of the statute of limitation is inadmissable in this tribunal.

3*d*. That defendants had a right, power and authority to arrest the plaintiff.

4*th*. That desertion is an offense of the grade of infamous or felonious crime.

5*th*. That no special warrant was required to authorise the arrest of plaintiff.

The writ is discharged and the prisoner remanded.

WILSON, Judge.

I concur:

D. J. MURPHY, Judge.

I concur:

TOOHY, Judge.